

# **2016-2017 Legal Issues Student Guide**



**Municipal Police Training Committee**

***Dan Zivkovich, Executive Director***



## **Legal Issues TY 2016-2017**

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**This document is intended to serve as a training guide for legal instructors to review new case law and legislation that has been issued from the controlling courts in Massachusetts, the Supreme Judicial Court and the Massachusetts Appeals Court over the course of the year. Some Supreme Court decisions are included in this curriculum. While this curriculum examines the impact of new cases or law by revisiting some past cases, it is not intended to serve as a criminal law or criminal procedure book. For specific guidance on the application of these cases or any law, please consult with your supervisor or your department's legal advisor or prosecutor. Additionally, please remember that many cases are fact specific and contain variations that make it difficult for the Courts to establish bright line rules for policing.**

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# Chapter 1

## MOTOR VEHICLE LAW

### Updates on OUI Cases

#### **"Operation" in OUI Cases**

**Commonwealth v. Beltrandi**, 89 Mass. App. Ct. 196(2016): Police responded to a 911 call where a neighbor reported seeing a truck partially parked on the road. When Officer Underwood arrived, he saw a truck in the westbound lane, with its engine running and lights out. The windows were fogged up and there was no movement inside the vehicle. While standing at the vehicle's back bumper, Officer Underwood observed "a female party in the driver's seat and a male party in the passenger seat," and he knocked on the driver's side window several times. The defendant, Amy Beltrandi, who was sitting in the driver's seat, rolled down the window. The defendant and her companion were only partially clothed and began dressing at Officer's Underwood's request. After speaking with the defendant, and suspecting she may be intoxicated, Officer Underwood asked her to perform field sobriety tests. The defendant was unable to complete the field sobriety tests and was arrested for operating a motor vehicle while intoxicated. During the trial, the defendant filed a motion for a required finding of not guilty. The defendant argued that there was insufficient evidence to prove that she operated the motor vehicle under G. L. c. 90, § 24(1)(a)(1)., The defendant did not deny that she had been intoxicated nor did she dispute that she had driven the vehicle on a public way. Rather, the defendant argued that the Commonwealth failed to prove she operated the motor vehicle. The judge denied the motion and the Appeals Court examined under G.L. c. 90, § 24, **what qualifies as operation of a motor vehicle.**

"An individual operates a motor vehicle when he or she intentionally does any act or makes use of any mechanical or electrical agency which alone or in sequence will set in motion the motive power of that vehicle." **Commonwealth v. Uski**, 263 Mass. 22, 24 (1928). See **Commonwealth v. Eckert**, 431 Mass. 591, 599 (2000) (intentional act of starting the vehicle constitutes operation); **Commonwealth v. Sudderth**, 37 Mass.App.Ct. 317, 320 (1994) (intoxicated driver asleep in vehicle with key in ignition and engine running is operating the vehicle); **Commonwealth v. McGillivray**, 78 Mass.App.Ct. 644, 645-647 (2011) (placing the key in the ignition and turning the electricity on without starting the engine is operation). The Commonwealth does not need direct evidence to establish that a person operated a motor vehicle. **Commonwealth v. Woods**, 414 Mass. 343, 354-355.

Although the defendant was sitting in the driver's seat when Officer Underwood approached, she argued that it was not clear who was operating the motor vehicle since there was another person present. "The presence of a second person in the vehicle raises the issue that potentially the defendant was not the operator of the motor vehicle." During the motion hearing, there was no other evidence to indicate who was driving the vehicle other than the defendant sitting in the driver's seat, dressing herself. Because there were few details, the



defendant argued that there was insufficient evidence to prove she was the operator of the vehicle. The Court disagreed and held that the presence of a second person in the vehicle does not negate the inference that the defendant could have been the operator of the vehicle. In **Commonwealth v. Mullen**, 3 Mass. App. Ct.25 (1975), even though the defendant was found outside of the vehicle, and another occupant was found inside the vehicle, the location of the defendant did not negate the inference that the defendant could have operated the motor vehicle. Here, it was not unreasonable for a jury to infer that the defendant was the operator of the vehicle based on the facts and therefore the motion was properly denied.

- ❖ **TRAINING TIP:** Although **Beltrandi** focuses on issues that surface during an OUI trial, it highlights why details in report writing can make a difference in the outcome of the case. This case is a good review of what qualifies as operation of a motor vehicle under G.L. c. 90, § 24.

### **Breathalyzer Test Issues**

**Commonwealth v. Camblin**, 471 Mass. 639 (2015): The SJC held that the defendant was entitled to a Daubert-Lanigan hearing to address the reliability of the breathalyzer based on the questions with the source code and other issues, including whether the instrument tests exclusively for ethanol or whether the calibration system fails to adequately measure the reliability of the device.

The defendant in this case, along with sixty-one defendants involved in other OUI cases pending in the District Court, moved to exclude admission of breath test evidence derived from the use of a particular model of breathalyzer, the Alcotest 7110 MK III-C (Alcotest), on the basis that errors in the Alcotest's source code as well as other deficiencies rendered the breath test results unreliable. The judge specially assigned to these cases denied the motion without a hearing, evidentiary or otherwise. However, the SJC found that because the breath test evidence, at its core, is scientific evidence, the reliability of the Alcotest breath test result had to be established before evidence of it could be admitted, see **Commonwealth v. Lanigan**, 419 Mass. 15, 25-26 (1994), and, in this case, a hearing on and substantive consideration of the defendant's challenges to that reliability were required.

- ❖ **TRAINING TIP:** A single justice at the SJC is considering whether defense experts must sign breathalyzer test nondisclosure forms. In the initial **Camblin** decision that came out in June 2015, the SJC highlighted several problems (stemming from recent appealed cases) that they wanted addressed (ie scientific reliability, calibration standards, etc.) and they are now considering these issues.

### **Warrant for Blood in OUI Cases**

- ❖ **TRAINING TIP:** The Supreme Court issued a decision that requires warrants for blood samples in OUI cases. This has a significant impact on states that impose a criminal penalty if a person does not consent to a blood test. In Massachusetts, the law imposes a civil penalty or loss of license if an individual does not consent to a blood test. Because of this difference, this Supreme Court decision does not change anything in Massachusetts. However, this case did re-enforce that breath tests do not have the same privacy implications as blood tests.

***Birchfield v. North Dakota***, 136 S. Ct. 2160, (2016): The Supreme Court consolidated three cases. Two of the cases occurred in North Dakota while the third incident happened in Minnesota. The primary issue addressed whether requiring a suspect to take a blood test without a warrant violated the Fourth Amendment. States vary with the penalties for operating under the influence of alcohol. Despite these differences, all states have laws that prohibit motorists from driving with a blood alcohol concentration (BAC) exceeding a specified level. BAC is typically determined through a direct analysis of a blood sample or by using a machine to measure the amount of alcohol in a person's breath. To help secure drivers' cooperation with such testing, the States have also enacted "implied consent" laws that require drivers to submit to BAC tests. Originally, the penalty for refusing a test was suspension of the motorist's license. Over time, however, states have toughened their drunk-driving laws, imposing harsher penalties on recidivists and drivers with particularly high BAC levels. Because motorists who fear these increased punishments have strong incentives to reject testing, some States, including North Dakota and Minnesota, now make it a crime to refuse to undergo testing.

**Conclusion:** The Court held that the Fourth Amendment permits warrantless breath tests incident to arrest for drunk driving but not warrantless blood tests.

The Court determined that blood and breath tests are considered searches under the Fourth Amendment. Since both are regarded as searches, the Supreme Court analyzed whether to treat breath and blood tests differently. After examining the privacy interests of the blood tests and breath tests, the Court found that blood tests are more intrusive. Breath tests do not "implicate significant privacy concerns." ***Skinner***, 489 U. S., at 626. The physical intrusion is almost negligible. The tests "do not require piercing the skin" and entail "a minimum of inconvenience." ***Id.***, at 625. Requiring an arrestee to insert the machine's mouthpiece into his or her mouth and to exhale "deep lung" air is no more intrusive than collecting a DNA sample by rubbing a swab on the inside of a person's cheek, ***Maryland v. King***, 569 U. S. \_\_\_, \_\_\_, or scraping underneath a suspect's fingernails, ***Cupp v. Murphy***, 412 U. S. 291. Breath tests, unlike DNA samples, also yield only a BAC reading and leave no biological sample in the government's possession. Finally, participation in a breath test is not likely to enhance the embarrassment inherent in any arrest.

Unlike breath tests, blood tests do implicate privacy concerns because they do not "require piercing the skin" and extract a part of the subject's body, ***Skinner, supra***, at 625, and thus are significantly more intrusive than blowing into a tube. A blood test also gives law enforcement a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. That prospect could cause anxiety for the person tested.

Lastly, the Court examined whether forcing a person to take a blood tests violated the Fourth Amendment. The Court held that it did violate the Fourth Amendment even though it understood that harsher penalties were imposed to combat drunk driving. It is one thing to approve implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply, but quite another for a State to insist upon an intrusive blood test and then to impose criminal penalties on refusal to submit. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads. The Court did not address refusals under state laws where the penalty was civil in nature.

### ***Search Warrants for Blood Samples:***

***Missouri v McNeely***, 133 S. Ct. 1552 (April 2013): The Supreme Court held that police should get a warrant when testing for alcohol in the bloodstream. The natural dissipation of alcohol in the bloodstream in drunk driving cases does not create an exigent circumstance and therefore fails to justify conducting a blood test without a warrant.

### ***Refresher on access to breath and blood tests in OUI cases:***

***In Massachusetts a person arrested for OUI can either consent to a breath test at the police station or to a blood test at the hospital if arrested for Operating Under the Influence of Alcohol. The suspect can refuse to take either test.***

- ❖ If the suspect refuses to submit to the breath test, the police will have to rely upon field observations that occurred during the stop. If a suspect is injured and transported to the hospital, police can subpoena the medical records if the suspect does not consent to the blood test. The refusal of the blood test offered by the police at the hospital is treated the same way as refusing a breath test at the police station and will result in a loss of license.

***Blood tests are admissible if defendant submits to them during the course of treatment.***

The SJC has held that results of blood tests are admissible and do not implicate the privilege against self-incrimination. ***M.G.L. c. 90, § 24(1) (e); Commonwealth v. Brennan***, 386 Mass. 772, 776(1982).

***The SJC holds that there is no right to counsel under the 6<sup>th</sup> and 14<sup>th</sup> Amendments before a defendant decides to submit to a breathalyzer test!***

***Commonwealth v. Timothea Neary-French***, SJC No. 12057 (2016): On November 28, 2012, at approximately 1:15 P.M., a woman signaled to Chief Stephen O'Brien of the Lenox police department that the defendant, Timothea Neary-French, was "bumping into" another vehicle with her vehicle. Based on their observations, Lenox police suspected that the defendant was operating a vehicle while under the influence. After administering field sobriety tests, police arrested the defendant and brought her to the station where she was advised of her Miranda rights and began the booking process. At approximately 1:50 P.M., the defendant was presented with a "statutory rights and consent" form, which contained an "operating while under the influence rights." The form described her right to a physician under G. L. c. 263, § 5A, her to make a telephone call under G. L. c. 276, § 33A, a request to submit to a chemical test under G. L. c. 90, § 24, and a notice to persons holding a commercial driving license. The defendant was advised by police officers of her statutory right to make a telephone call under G. L. c. 276, § 33A, and was asked by police to submit to a breathalyzer test at approximately 1:51 P.M. The defendant initially refused the breathalyzer test, but she consented after three to four minutes later which indicated her blood alcohol level above was above .08.

The defendant filed a motion to suppress the breathalyzer test results, arguing that she had a right to counsel under the Sixth and Fourteenth Amendments of the United States

Constitution and art. 12 of the Massachusetts Declaration of Rights, before deciding whether to submit to a breathalyzer test. The motion was denied but the judge reported the issue as a question of law to the Appeals Court and the SJC transferred the case. The SJC had to consider the impact of the 2003 amendment to G. L. c. 90, § 24, that made a breath test reading of .08 a per se violation under G. L. c. 90, § 24 and its effect on a person's rights. Because of this change, deciding to take the breathalyzer becomes a critical stage of the criminal proceedings and requires a defendant receive advice from counsel before choosing to submit to a breathalyzer test pursuant to art. 12 of the Massachusetts Declaration of Rights and the Sixth and Fourteenth Amendments of the United States Constitution.

**Conclusion:** The SJC holds that there is no constitutional right to counsel under the Sixth Amendment or art. 12 when deciding to submit to a breathalyzer test because taking the breathalyzer test is not a critical stage in criminal proceedings.

**1<sup>st</sup> Issue: Does the per se violation make deciding to take a breathalyzer test a critical stage in criminal proceedings?**

The SJC reexamined its holding in *Brazelton*, 404 Mass. at 785, which was issued before the 2003 amendments. In that decision, the SJC held that deciding whether to submit to a breathalyzer test was not a critical stage in the criminal process. After a defendant is arrested and brought to a police station, police provide a statutory right of access to a telephone within one hour upon arrival and a statutory right to be examined by a physician of the defendant's own choosing. The SJC found that these statutory rights adequately protect the defendant. The SJC recognized the potential practical problems that a right to counsel at the breathalyzer test stage could present, such as the possibility of "stale and inaccurate" results due to a delayed breathalyzer test because counsel is unavailable. *Id.* Based on its assessment of *Brazelton*, the SJC concluded that the creation of a "per se" violation theory under G. L. c. 90, § 24, does not transform the decision to submit to a breathalyzer test into a critical stage in the criminal justice process and therefore there is no constitutional right to counsel under the Sixth Amendment or art. 12 when deciding whether to submit to a breathalyzer test.

The SJC found that administering the breathalyzer test post arrest but prior to the initiation of an adversary judicial proceedings further supports its conclusion that it is not a part of critical state of the criminal justice process. Under the Sixth Amendment, there is no right to counsel at the time a defendant is deciding whether to submit to a breathalyzer test. Similarly, under art. 12, the SJC has consistently held that the right to counsel "attaches at the time judicial proceedings are commenced." *Commonwealth v. Anderson*, 448 Mass. 548, 553- 554 (2007). *See Commonwealth v. Celester*, 473 Mass. 553, 567 (2016); *Commonwealth v. Caldwell*, 459 Mass. 271, 287 (2011). Specifically, "[t]his court has held, '[t]here is no authority for the proposition that the right to counsel under the Sixth and Fourteenth Amendments or under art. 12 arises prior to arraignment, even though a criminal complaint and an arrest warrant have issued.'" *Commonwealth v. Ortiz*, 422 Mass. 64, 67 (1996). *See Commonwealth v. Jones*, 403 Mass. 279, 286 (1988). Because the decision whether to submit to a breathalyzer test takes place before the initiation of formal judicial proceedings, there is no right to counsel at the breathalyzer stage under art. 12. Although the decision whether to submit to a breathalyzer test is an important tactical decision for the defendant. *See Commonwealth v. McCoy*, 601 Pa. 540, 543, 546 (2009), it occurs at the evidence gathering stage, before the Sixth Amendment or art. 12 right to counsel attaches.

The Supreme Court in **Wade**, 388 U.S. at 227-228, explained that "preparatory steps, such as systematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, [and] hair are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate from his right to a fair trial." Based on all these factors, the SJC reaffirms its findings in **Brazelton** and concludes that there is no right to counsel under the sixth amendment or article 12 at the time the defendant is deciding whether to take a breathalyzer test.

### **OUI Drug Cases**

- ❖ **TRAINING TIP:** OUI drug cases in Massachusetts are challenging because they require police to identify the substance in the police report that they believe the suspect took while driving.
- ❖ Police can also charge operating to endanger if they suspect OUI drugs but cannot identify what drug the person may have taken.

#### **Elements for OUI Drug cases:**

1. The driver took drugs;
2. The driver took one of the drugs classified as a controlled substance pursuant to G.L. c. 94C, § 31, (marijuana<sup>1</sup>, narcotic drugs, depressants, stimulants, or vapors of glue.) Note, that vapors of glue is further defined by G.L. c. 94C § 1; and
3. The drugs caused the driver to be legally impaired while operating a motor vehicle.

**Commonwealth v. Green**, 408 Mass. 48, 50 (1990), requires that the substance the police suspect the driver ingested is included in the definition of a narcotic, depressant or stimulant. In **Green**, the evidence showed that the defendant had consumed codeine, which is a derivative of opium and therefore within the statutory definition of a narcotic. **Id.** at 49. The conviction was overturned because there was no evidence introduced at trial that identified codeine as a narcotic. **Id.** at 50.

### ***The Smell of Marijuana Alone is Insufficient to Stop a Motor Vehicle to Issue a Civil Citation!***

**Commonwealth v. Elivette Rodriguez** 472 Mass. 767 (2015): A seasoned narcotics officer of the New Bedford Police Department was working with a specialized unit and conducting surveillance of a particular motor vehicle in the area. Detective Amaral had previously arrested the driver for heroin possession. As Detective Amaral followed the vehicle, he could detect an odor of burnt marijuana because his cruiser windows and the suspect windows were open. Detective Amaral stopped the vehicle even though he did not observe any traffic violations.

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<sup>1</sup> Although medical marijuana was legalized in 2013, it is still illegal to operate a vehicle while smoking or ingesting marijuana.

The driver of the vehicle was a male and had what appeared to be a marijuana cigar in his right hand. The driver told Detective Amaral that the odor he smelled was coming from the cigar. Because the driver did not exhibit any signs of impairment, Detective Amaral did not administer any field sobriety tests to the driver. Additionally, the driver was able to provide a license and registration. At some point, police searched the motor vehicle and discovered a plastic bag inside the car containing sixty (60) Percocet pills. The defendant who was the passenger in the vehicle was charged with possession with intent to distribute a class B substance within a school zone and conspiracy to violate the drug laws all in connection within the pills that were seized from the motor vehicle.

The defendant filed a motion to suppress and argued that the stop was unlawful. It was not clear from the record of the motion to suppress how the pills were initially discovered during the stop. According to the Commonwealth, the stop was lawful because it compared to a routine stop for a civil traffic violation. The question before the SJC was "whether the Fourth Amendment and art. 14 permit police to stop a vehicle where they have reasonable suspicion, but not probable cause, to believe that a civil infraction for marijuana possession is occurring or has occurred."

**Conclusion:** The SJC held that the stop was unlawful and that there was "no governmental interest," that justified police stopping a vehicle based on reasonable suspicion that someone in the vehicle possesses an ounce or less of marijuana in violation of G.L. c. 94C, § 32L.

### **1<sup>st</sup> Issue: Was there reasonable suspicion to stop the motor vehicle?**

The SJC concluded that of the smell of burnt marijuana may support reasonable suspicion that an individual is committing a civil offense for possession of marijuana. However the smell of burnt marijuana does not establish probable cause that a person is committing a criminal offense and therefore it is insufficient to stop of motor vehicle on that factor alone. As part of its analysis, the SJC reviewed the number of cases that addressed whether police have probable cause to issue an exit order based on the odor of burnt marijuana alone. The **Cruz** case established that an odor of burnt marijuana alone did not create probable cause or even reasonable suspicion of criminal activity sufficient to justify an exit order. **Commonwealth v. Cruz**, 459 Mass 459 (2011).

Previously, the SJC determined in **Overmeyer**, that an odor of unburnt marijuana alone does not provide police with probable cause to search a vehicle without a warrant. **Commonwealth v. Overmeyer**, 469 Mass. 16 (2014). Here, the SJC considered whether an odor of burnt marijuana alone coming from a moving motor vehicle provided police with reasonable suspicion to stop the motor vehicle and subsequently issue a civil citation for possession of marijuana.

Here, Detective Amaral did not observe any erratic driving, when he detected an odor of burnt marijuana. While there may have been some indicia that a drug transaction occurred prior to the stop, these factors still fail to provide police with reasonable suspicion. Furthermore, an odor of burnt marijuana coming from a vehicle does not establish probable cause that a civil violation has occurred because the odor could be coming from the clothes of the passengers or due to another factor. Based on the facts, the SJC found that police only had reasonable suspicion that a civil violation was taking place. Also, even though police were

conducting surveillance of the vehicle, it did not establish reasonable suspicion of a criminal violation and failed to justify the stop.

Despite the lack of reasonable suspicion, the Commonwealth argued that stopping a motor vehicle to issue a citation for marijuana is comparable to stopping a motor vehicle that has committed a traffic violation. The SJC did not agree and held that while stopping motor vehicle to investigate civil marijuana infractions serves a general law enforcement purpose, there is no obvious and direct link between enforcement of the civil penalty for marijuana possession and maintaining highway safety. Moreover, the SJC held that permitting police to stop a motor vehicle to issue a civil citation based upon the smell of burnt marijuana and nothing more, runs contrary to the purpose of G.L. c. 94C, § 32L.

"Although many traffic violation statutes regulate moving cars and relate directly to the promotion of public safety; even those laws that have to do with maintaining a vehicle's equipment in accordance with certain standards may also be safety-related." Permitting stops based on reasonable suspicion or probable cause that these laws may have been violated gives police the ability to immediately address potential safety hazards on the road. Although a motor vehicle stop does represent a significant intrusion into an individual's privacy, the governmental interest in allowing such stops for the purpose of promoting compliance with our automobile laws is clear and compelling.

"There are three policy goals that c. 94C, § 32L, intended to serve: (a) to reduce the direct and collateral consequences of possessing small amounts of marijuana, (b) to direct law enforcement's attention to serious crime, and (c) to save taxpayer resources previously devoted to targeting the simple possession of marijuana." Allowing the police to stop a vehicle based on reasonable suspicion that an occupant possesses marijuana does not serve these objectives. "Rather, it encourages police to continue to investigate and to pursue individuals suspected of this offense in the same manner as before decriminalization, it does not refocus police efforts on pursuing more serious crime, and it subjects individuals who police merely suspect may be committing a non-dangerous, civil offense to all of the potential consequences of a vehicle stop."

The SJC further stated that not all types of reasonable suspicion warrant a motor vehicle stop. The civil marijuana violation established in M.G.L. c. 94C, §§ 32L-32N, does not specifically target motor vehicles, but was intended to direct law enforcement attention away from marijuana and to "more serious crime." Based on this distinction, the SJC ruled that motor vehicle stops based on reasonable suspicion of a civil marijuana violation are unreasonable and therefore violate Article 14 of the Massachusetts Declaration of Rights.

"Although marijuana possession remains illegal, the present case is not an example of where a police officer actually observed an infraction, such as a person walking through a park smoking what appeared to be a marijuana cigar or cigarette, and stopped the offender for the purpose of issuing a citation and confiscating the offending item." Rather, here, an officer smelled burnt marijuana, nothing more, and stopped a vehicle to investigate further whether a citation was appropriate. (It was only after the stop had been made that Amaral observed the driver's marijuana cigar.) Because stops based on reasonable suspicion of a possible civil marijuana infraction do not promote highway safety and run contrary to the purposes of G.L. c. 94C, § 32L, the SJC held that extending the rule that allows vehicle stops based on

reasonable suspicion of a civil motor vehicle offense to stops to enforce the civil penalty for possession of one ounce or less of marijuana do not promote highway safety and run contrary to the purposes of Such stops are unreasonable; therefore, the stop in this case violated art. 14.”

***Inhaling computer aerosol cans does not qualify as “glue” under G. L. c. 94C, § 21 (OUI Drug)!***

***Commonwealth v. Sousa***, 88 Mass. App. Ct., 47 (2015): The Court held that difluoroethane, the chemical that was contained in the canister that the officer observed the driver inhaling, was not the chemical equivalent of ethylene fluoride, and did not qualify as “glue” under in G. L. c. 94C, § 1. The Court vacated the OUI drugs conviction, but upheld the conviction for negligent operation of motor vehicle.

***I. Motor Vehicle Stops***

- ❖ **TRAINING TIP:** Below is a Supreme Court decision which essentially holds that without additional factors, delaying a traffic stop after issuing a traffic citation is unconstitutional.

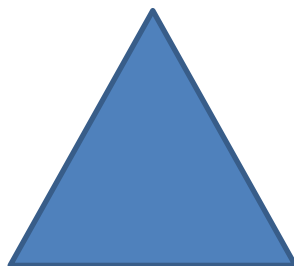
***Rodriguez v. United States***, No. 13–9972, (2015): The Supreme Court holds absent reasonable suspicion, police extension of a traffic stop in order to conduct a dog sniff violates the Constitution’s shield unreasonable seizures.

Beyond determining whether to issue a traffic ticket, an officer’s mission during a traffic stop typically includes checking the driver’s license, determining whether there are outstanding warrants against the driver, and inspecting the automobile’s registration and proof of insurance. These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly. See ***Delaware v. Prouse***, 440 U. S. 648, 658–659. Lacking the same close connection to roadway safety as an ordinary inquiries, a dog sniff is not fairly characterized as part of the officer’s traffic mission. A traffic stop “becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission” of issuing a warning ticket,” ***Illinois v. Caballes***, 543 U. S. 405, 407 407 (2005).

***Reasons for Exit Orders***

**Officer Safety**

**Criminal Activity Afoot**



***Other Pragmatic Reasons***



## **Review of Routine Traffic Stops and Exit Orders**

The SJC held that there are three bases upon which an exit order issued to a passenger in a validly stopped vehicle may be justified:

1. "An objectively reasonable concern for safety of the officer
2. reasonable suspicion that the passenger is engaged in criminal activity, or
3. "pragmatic reasons."

As to the first, "it does not take much for a police officer to establish a reasonable basis to justify an exit order or search based on safety concerns." **Commonwealth v. Cruz**, 459 Mass. 459 (2011):

***Safety concerns are heightened when police stop a vehicle with gang members that may be armed.***

Police are justified issuing an exit order when police are concerned about their safety during a traffic stop involving gang members who may be armed. The Court held that the police do not need to see the driver or passengers commit any violations in order to issue an exit order **Commonwealth v. Stack**, 49 Mass. App. Ct. 227 (2000).

***Exit Order and search of a vehicle were valid based on "totality of circumstances."***

**Commonwealth v. Obiora**, 83 Mass. App. Ct. 55 (2013): Viewed in the "totality of the circumstances," a lone officer, late at night, with three detained persons and false identification information had "a heightened awareness of danger that would warrant an objectively reasonable officer in securing the scene in a more effective manner by ordering the passenger to alight from the car." The exit order was not "an intrusion disproportionate to the seriousness of the situation with which the trooper was confronted." See **Commonwealth v. Washington**, 459 Mass. 32, 40 (2011).

***Any movements made towards an officer can be perceived as a safety issue.***

**Commonwealth v. Moreira**, 388 Mass. 596, 600 (1983): The Court held that even if an officer makes an incorrect statement about the law, there is no justification for a person to use force against an officer or make a movement which could be perceived by the officer as a safety threat to the officer or anyone else present.

***Sudden movements made inside a vehicle during a traffic stop can be perceived as a safety issue.***

**Commonwealth v. Demirtshyan**, 87 Mass. App. Ct. 737 (2015): The Appeals Court denied the motion to suppress. The Court compared this case to **Commonwealth v. Gonsalves**, 429 Mass. 659 (1998), which established that "an officer need to only point to some fact or facts in the totality of the circumstances that would create a heightened awareness of danger that would warrant an objectively reasonable officer in securing the scene in a more effective manner by ordering the passenger to alight from the car." Here, Officer Reen was "faced with a specific, sudden and unexpected movement by the driver into an area of the vehicle

containing backpack that could conceal weapon.” The Appeals Court found that lunging towards the backseat was sufficient to raise a concern for officer safety.

***Pat-frisks can extend to protective sweep of interior of motor vehicle if there are still concerns about officer safety.***

***Commonwealth v. Douglas***, 472 Mass. 439 (2015): The SJC concluded that the protective sweep of the interior of the vehicle was justified due to Douglas’s subsequent conduct. In this case there were a number of factors that justified the exit orders and pat-frisks of the occupants. The police were familiar with the defendant and knew he was involved in a gang and had a past history of crimes including firearms offense. Additionally, the back seat passenger and the defendant made unusual movements and the defendant’s failure to comply with police orders only elevated the safety concerns. All these factors provided justification for the police that one of the passengers may be armed.

### **Motor Vehicle Stops**

#### ***Reasonable suspicion required to issue a BOLO!***

***Commonwealth v. Keene***, 89 Mass. App. Ct. 902 (2016): On April 13, 2013, a Stoughton police officer observed two men including the defendant, Antoine Keene, run out of a nightclub in Stoughton. Without asking the men, their names, the Stoughton police asked why they were running and the men responded that there was a fight inside the night club. The two men left in a Nissan Altima and the officer wrote down the license plate number. Ten minutes after their departure, there was shooting outside of the nightclub and Stoughton police issued a BOLO that requested nearby police departments to stop and hold a vehicle that matched the description of the Nissan Altima and to be aware that the men may be armed and dangerous.

After receiving the BOLO, two Boston Police officers on patrol in Mattapan stopped the vehicle matching the description with their guns drawn. The two men complied with the police’s orders but were surprised to find a third man sitting in the back seat of the vehicle. During the sweep, one of the officers observed "green leafy material in a bag" in the driver's door and also noticed that the armrest of that same door appeared to be loose and not sealed as designed. A k-9 was brought to the scene and alerted his handler to an armrest. At that point, Boston Police recovered the firearm that was inside a cloth bag. The defendant appealed and argued that the Stoughton and Boston Police lacked reasonable suspicion to stop the vehicle. The Commonwealth did not dispute that the Stoughton Police lacked reasonable suspicion but argued that Boston police were acting reasonably in response to a BOLO radio report that described the defendant and his companion as ‘considered armed and dangerous.’ The defendant argued that the Boston police acted on incorrect information and therefore the actions resulted in a 4<sup>th</sup> Amendment violation.

**Conclusion:** The Appeals Court upheld the motion to suppress and found that because the Stoughton Police lacked reasonable suspicion to issue a BOLO, the subsequent stop and search of the vehicle by Boston Police was not valid.

**1<sup>st</sup> Issue: Does the 4<sup>th</sup> Amendment that extends to Stoughton Police extend to Boston police as well?**

The Court compared the circumstances in this case to ***U.S. v. Hensley***, 469 U.S. 221 (1985). In ***Hensley***, police in a neighboring jurisdiction acted on information they had seen in a wanted flyer about the defendant being a suspect involved in an armed robbery. ***US v. Hensley***, 469 US 221 (1985) The Supreme Court in ***Hensley*** found that the wanted flyer provided police with reasonable suspicion to justify the stop. Here, the Stoughton police were not aware of any articulable facts that supported a reasonable suspicion sufficient to warrant a stop of the defendant's vehicle. Even though Stoughton had issued a BOLO, there was no basis for it. It is significant that the Commonwealth does not dispute that the Stoughton police lacked reasonable suspicion to suspect that the men in the Nissan were involved in the shooting. Rather the Commonwealth acknowledged that Stoughton Police conveyed "misinformation" to the Boston police. However, despite this misinformation, the Commonwealth argued that the sole basis for the stop and search at issue is "not relevant to the inquiry, nor relevant to the purpose of the exclusionary rule." As a result, although Boston police acted on information they had received, the motor vehicle stop should be lawful and the motion to suppress reversed. The Appeals Court disagreed and upheld the motion to suppress.

***Information provided to police by a confidential informant was sufficient to stop a motor vehicle!***

***United States v. Jorge Sanchez***, U.S. 817 F. 3d 38 (1<sup>st</sup> Cir. 2016): Springfield police received information from a confidential informant, ("CI") that the defendant, Jorge Sanchez, was in a vehicle and had a firearm on his person. Previously, Springfield Police had worked with the same CI who had provided tips about street level drugs and firearms cases. The police observed the defendant, Jorge Sanchez, who matched the description that the CI had given them standing outside of an apartment building. Springfield Police recognized the defendant as a suspected gang member who had been previously arrested in 2004 for possession with intent to distribute heroin and cocaine, an offense that resulted in a conviction, meaning that Sanchez could not legally carry a firearm .

After observing the defendant for about 10 minutes, police saw the defendant place his left hand on his left hip where his t-shirt hung over his waistband. The officer could see the shape of an object underneath the shirt. The defendant's movement reminded one of the officers of how he checks his concealed firearm. As a result of his observations, and based on his training and experience, the police believed the defendant had a firearm and they stopped him. Police grabbed the firearm and arrested the defendant. A search incident to arrest turned up crack. The total time from the CI's call to Sanchez's arrest was approximately 15 minutes. The defendant filed an appeal arguing that the police lacked reasonable suspicion to stop him and therefore the seizure of the firearm was unlawful. The defendant also moved to suppress any statements he made about being a drug dealer during booking. The defendant argued that he was not Mirandized when he made these statements.

**Conclusion:** The 1<sup>st</sup> Circuit Court of Appeals affirmed the denial of the motion to suppress and determined that the police had reasonable suspicion to stop the defendant based on the information the CI had provided. The Court also found that the CI was reliable based on information he had provided to the police in the past that led to arrests. With regard to the statements made during booking, the Court held that the defendant's statements were made voluntarily during routine questioning and not for investigative purposes.

- ❖ **TRAINING TIP:** This case highlights the factors courts consider when determining if a CI is reliable. Another significant point in this case involves the officer's testimony about his observations of the defendant touching his waistband. The officer stated that the defendant's actions reminded him how he carries his firearm. Apart from training and experience, police are the best qualified to testify because they carry their firearms daily while working.

***The Court finds that police need more details to establish speeding during a motor vehicle stop!***

**Commonwealth v. Teixeira-Furtado**, 474 Mass. 1009 (2015): Boston Police officers working in the Youth Violence Strike Force were on patrol in an unmarked vehicle. They observed a known gang member driving a Honda with the defendant, Eddy Teixeira- Furtado, sitting in the front passenger seat. The Honda was speeding in an area where there was at least "one park and plenty of kids around." Police activated their lights and sirens but the Honda did not stop. Eventually, the Honda slowed down and the defendant exited the Honda with the vehicle still moving. The defendant ran across the street and was "grabbing the right side of his waist area." The officers chased the defendant and drew a firearm ordering the defendant to stop. The defendant stopped and said "all I have is a gun." Police arrested the defendant and charged him with unlawful possession of a firearm. A motion was filed and the issue focused on whether the police had reasonable suspicion to believe the defendant had a firearm. The judge allowed the motion and concluded that there was no testimony about rate of speed the Honda was traveling to justify a stop for violation of G.L. c. 90 § 17. The judge wrote that "without specific, articulable, objective facts that explain the conclusion, a finding that the Honda was traveling at an unreasonable rate of speed would amount to rubber-stamping police action without inquiry into the underlying reasons for the challenged conclusion." The Appeals Court denied the motion to suppress and the SJC heard the case on further appeal.

**Conclusion:** The SJC held that there was no basis for stopping the vehicle because there was insufficient evidence to establish the vehicle was speeding. Last year, the Appeals Court found the testimony of the officer established that vehicle's speed was unreasonable. The SJC disagreed and found that the Commonwealth offered nothing that would have permitted the motion judge to evaluate the reasonableness of the officer's conclusory statement that the speed was unreasonable. "Whether there is a reasonable suspicion that a violation of G.L. c. 90, § 17 has occurred, requires a consideration of a number of objective factors and should not be limited to an isolated factor of miles per hour." "The Commonwealth was not required to identify the vehicle's precise speed, but the testifying officer provided nothing on the subject of speed beyond his conclusion that it was greater than reasonable." The officer did not estimate the vehicle's speed, compare the vehicle's speed to the vehicle he was riding in, provide any measurement from a radar gun or other device; or testify that the vehicle was traveling faster than the posted speed limit for that particular road and location. Nor was there evidence presented regarding the traffic on the road, the use being made of the road at the time by pedestrians or others, or other relevant safety considerations.

## ***Movements towards a fanny pack provided reasonable suspicion for police to conduct a pat-frisk!***

**United States v. Cardona-Vicente**, 817 F. 3d 823 (1<sup>st</sup> Cir. 2016): Puerto Rican police stopped a vehicle for a seat belt violation. The defendant, Hector Gabriel Cardona- Vicente, was driving the vehicle could not provide a license to police. While the officer was verifying the vehicle's registration, he observed the defendant grabbing at his waist band where there was a fanny pack. The officer asked the defendant if he had a license to carry. When the defendant informed police he did not have a license to carry, police ordered the defendant out of the vehicle and conducted a pat-frisk. The pat frisk included feeling the exterior of the fanny pack. Police felt what appeared to be a gun and when police ordered the defendant to open the fanny pack, a 40 caliber Glock pistol with one round of ammunition in the chamber, eleven additional rounds in the magazine, \$597 in cash, and fourteen baggies of cocaine were recovered. Police also retrieved a cigar box with marijuana cigars and twenty-two baggies of marijuana under one of the seats. The defendant was arrested and charged with unlawful possession of a firearm along with numerous drug offenses.

The defendant appealed and argued that the seatbelt violation was insufficient to justify an exit order and subsequent pat-frisk. In the underlying case, the sequence of events that unfolded was sufficient to justify an exit order and subsequent pat-frisk. First, the defendant who was the driver of the vehicle could not produce a driver's license. Second, the passenger appeared nervous during the stop as the officer walked around the rear of the vehicle. The officer observed the defendant clutching a fanny pack in a manner that, based on his experience, was consistent with there being a gun inside. The 1<sup>st</sup> Circuit Court of Appeals concluded all of these factors "gave police reasonable suspicion to believe the defendant was armed and dangerous," and that once the pat-frisk was conducted, "the arrest was justified."

- ❖ **TRAINING TIP:** This case is a good review of the standards for a pat-frisk and what supports reasonable suspicion during a traffic stop.

## ***Stops Involving Rental Contracts***

**HYPOTHETICAL:** In June 2015, a state trooper stopped a motor vehicle for speeding. The driver, Marquis Moore asked why he was stopped. The trooper asked for his license and registration. Moore provided a valid driver's license from the state of New York and a rental agreement from Hertz. There were other passengers in the back seat who were not wearing seat belts and were asked to provide identification. All four passengers provided valid licenses from the state of New York. The name on the rental contract was Deran Thomas who was not present in the vehicle. Moore told the trooper that Thomas was his friend and let him borrow the vehicle.

The trooper intended to summons Moore for the criminal charge of use of a motor vehicle without authority until additional units arrived to assist. Initially, the trooper thought the rental agreement had expired so she contacted Hertz. Hertz confirmed that the rental agreement was valid. Because Moore was not authorized to drive the vehicle under the rental agreement with Hertz, the trooper elected to tow it and began to conduct an inventory search compliant with departmental policies. During the search of the vehicle, a powdery substance

believed to be cocaine was discovered. Moore and his passengers were arrested and the vehicle was towed. Do you think the trooper was justified in charging Moore with use without authority?

**ANSWER:** This hypothetical is based upon a real case from the Worcester Superior Court. **Commonwealth v. Williams**, 33 Mass. L. Rptr. 229 (2016). While the Court found the stop was permissible, it held the basis for arresting Moore for his operation of the rental car without permission from Hertz, was insufficient to charge use of a motor vehicle without authority pursuant to G.L. c. 90, § 24(2)(a). In the decision, the judge wrote, “our cases have not yet addressed the criminality of driving a rental car with permission from the lessee of the vehicle under § 24(2) (a).” See **Commonwealth v. Watts**, 74 Mass.App.Ct. 514, 518 n. 4, 908 N.E.2d 788 (2009)

The elements of use without authority are: (1) use; (2) of a motor vehicle; (3) on a public way; (4) without authority; (5) knowing that such use is unauthorized. **Commonwealth v. Moor**, 50 Mass.App.Ct. 730, 734, 741 N.E.2d 86 (2001). Authority implies “permission of the owner ... or the permission of some other person who possessed a legal right of control ordinarily exercised by the owner” of the vehicle. **Commonwealth v. Byone**, 49 Mass.App.Ct. 687, 690–691, 732 N.E.2d 340 (2000). “This Court does not read into § 24(2)(a) any intent by the Legislature to criminalize borrowing a rental car from a lawful lessee of that vehicle. In fact, the plainest reading of the elements indicates that a person borrowing a rented car from a lawful lessee is one with permission of some other person who possessed a legal right of control ordinarily exercised by the owner. That language necessarily allows for someone other than the actual owner of a vehicle to also be able to give permission for another person to drive the vehicle, despite any civil contract that the lessor and lessee have executed.”

Criminalization of the use of rental cars rented by friends or family members should not be taken lightly or just gradually accepted when it becomes customary for police to make such arrests and seizures on that basis. Certainly, not every breach of a civil contract is a criminal offense. To be certain, the Court found that the use of the vehicle was arguably a breach of Thomas’s contract with Hertz. However, because Moore had permission from Mr. Thomas (who lawfully rented the vehicle from Hertz) to drive the rental car, the Court believes that Mr. Moore had authority from “an individual who possessed a legal right of control of the vehicle.” **Id** and therefore the troopers had no basis to arrest Moore for use of a motor vehicle without authority.

- ❖ **TRAINING TIP:** Recently, there has been an increase of suspects using rental cars to transport contraband or controlled substances. From a policing perspective, there are questions as to whether a person can be criminally charged with use without authority if the driver of the vehicle was the name not included on the rental contract. One of the key requirements to establish use without authority involves whether the driver knew that they were not authorized to drive the vehicle. As a police officer, how do you verify that a person was not authorized to use a vehicle if their name is not included on the rental agreement? The driver may be able to provide information as to who gave him or her the vehicle. Additionally, if there is insufficient evidence to make an arrest, an officer may issue a summons. **For specific guidance on the application of these**

**cases or any law, please consult with your supervisor or your department's legal advisor or prosecutor.**

Use without Authority Elements (G. L. c. 90, §24 (2)):

- (1) use
- (2) Of a motor vehicle
- (3) In a public way
- (4) Without authority
- (5) Knowing that such use is unauthorized.

See ***Commonwealth v. Giannino***, 371 Mass 700 (1976).

❖ **TRAINING TIP:** Some courts have found that criminally charging a person with use without authority if they are not listed on a rental agreement is not appropriate. Essentially, some courts have held that if a person is driving a rental vehicle that does not list the person's name on the rental contract, it should be handled civilly as a breach of contract. In the ***Depina*** case, the judge dismissed the case for lack of probable cause to charge the defendant with use of a motor vehicle without authority. While the Commonwealth prevailed on appeal, the footnote included in ***Depina*** highlights the court's position with regard to charging a person criminally for driving a rental vehicle, that the person is not authorized to use. Below is the footnote in ***Depina***:

**"[T]his type of charge which is only based on the rental agreement, I routinely dismiss. I do not find that it is a criminal matter. I do not find that it supports the charge of use without authority as a probable cause matter. So without any evidence or anything else, if the basis is clear from the report or from the Commonwealth to be only that this individual is not on the rental agreement from the rental company, I do not feel that that supports a finding or a charge of use without authority, unless you have some evidence that he used it without authority of the renter or any other factors.**

***Commonwealth v. Depina***, 83 Mass. App. Ct. 1110, (2013): On June 14, 2011, Boston Police blocked a vehicle that had parked in hotel with a young woman because she matched the description of a missing person. Once the woman entered the hotel, a man left the vehicle running with its engine on. Upon questioning, the defendant, Celso Depina, informed the officers that the vehicle was a rental. The defendant relayed that his cousin had rented the vehicle and that he was not listed on the rental agreement. The police telephoned the cousin, who confirmed the defendant's story. The police arrested the defendant and secured a criminal complaint against him for use of a motor vehicle without authority, G. L. c. 90, § 24(2) (a). After the defendant was charged, he filed a motion to dismiss. The judge dismissed the case for lack of probable cause, and held that there was insufficient evidence to charge the defendant with use of a motor vehicle without authority.

**Conclusion:** The Appeals Court reversed the dismissal order and determined that there was probable cause to charge the defendant with use without authority. The distinguishing factor in this case focused on the facts that were included in the police report. According to the

report, the defendant “stated that the vehicle was a rental and that he was not listed on the rental agreement.” The police confirmed with the defendant’s cousin, that he was not named on the rental agreement. Based on these facts, and the logical inferences that follow, establish probable cause of that the defendant knew he was not authorized to drive the vehicle.

- ❖ **TRAINING TIP:** One issue that was not examined in **Locke**, but is worth mentioning concerns whether the police could have charged the defendant with use without authority.

**Commonwealth v. Andrew K. Locke**, 89 Mass. App. Ct. 497, *further appellate review denied*, (2016): After the police stopped the defendant, Andrew Locke, and learned that he did not know whether he was an authorized driver on the rental contract, it is unclear if the police contacted the rental company or even considered charging him with “use without authority.” The Commonwealth suggested that the police could have arrested and charged the defendant for the above offense because he was not identified on the rental contract as an authorized driver. If the defendant were arrested for use without authority, the minivan would have been towed because the passenger did not have a license. Presumably, an inventory search would have been conducted, and the marijuana likely discovered.

Unfortunately, the Commonwealth did not pursue this issue on appeal. Second, since the defendant did not know whether he was an authorized driver, the police would not have been able to charge the defendant with use without authority, because the knowledge element was not satisfied. Additionally there was no testimony that the rental contract prohibited other drivers, and the judge made no findings regarding this issue.

Contrast **Commonwealth v. Henley**, 63 Mass. App. Ct. 1, 5-6 (2005) (name of driver of rental car not on contract and his temporary license had expired); **Commonwealth v. Watts**, 74 Mass. App. Ct. 514, 518-519 (2009) (rental agreement had expired, vehicle had been “queried” by police department within last thirty days, and rental agency told officer that defendant was not authorized operator and that they did not want him driving it).

### ***The “Very Strong” Odor of Fresh Marijuana Does Not Provide Probable Cause to Search a Motor Vehicle!***

**Commonwealth v. Andrew K. Locke**, 89 Mass. App. Ct. 497, *further appellate review denied*, (2016): A state trooper stopped a minivan, after he observed it driving erratically and speeding while approaching a tollbooth. The trooper did not see any furtive movements and no one attempted to flee. The trooper noticed that the windows of the minivan were tinted and had interior shades that were pulled down. When the trooper spoke to the driver through an open window, he immediately detected a very strong odor of unburnt marijuana. The defendant, Andrew Locke, was seated in the driver’s seat, his chest was heaving, and he began talking excessively while the passenger stared straight ahead. The defendant provided the trooper with an Arizona driver’s license and a rental agreement in the name of “Robert Spinks.” The rental agreement indicated that the minivan had been rented two days earlier in Rhode Island and it was under a different name. The defendant told the trooper he had borrowed the minivan from his uncle because he wanted to visit his daughter in Boston. It was unclear if the defendant was authorized to drive the minivan.



During the stop, the trooper noticed several air fresheners in various locations of the minivan. Based on his training and experience, the trooper knew that air fresheners often are used to mask the odor of narcotics in a vehicle. The trooper ordered the defendant out of the vehicle and sat in him the backseat of the cruiser, without handcuffs. The trooper asked the defendant whether he had marijuana on him, and the defendant stated no but admitted he had smoked marijuana earlier in the day with the passenger. A drug detection dog was deployed to the scene. The trooper also asked the passenger for his identification. The passenger did not have any identification and he denied smelling an odor of marijuana coming from the minivan. The trooper ordered the passenger out of the minivan and he conducted a pat-frisk of the defendant and the passenger. No marijuana or contraband was found on either of them. However, the defendant did have \$3500 cash on his person. The drug detection dog alerted police to the rear gate of the minivan. Police opened the gate and found 159 pounds of marijuana in the back of the minivan. The defendant and passenger were arrested and charged with trafficking marijuana under G. L. c. 94C, § 40 (2). The defendants filed a motion to suppress and it was allowed. The Commonwealth appealed and argued that there were a number of factors that suggested criminal activity was afoot.

**Conclusion:** The Appeals Court affirmed the motion to suppress and held that although the initial stop was proper, the subsequent exit order and pat-frisk were not.

### **1<sup>st</sup> Issue: Was the stop justified?**

The Court held that police were justified in stopping the minivan for erratic operation and speeding. ***Commonwealth v. Torres***, 433 Mass. 669, 673 (2001) (where police have observed traffic violation, they are warranted in stopping vehicle). Detaining a vehicle for a motor vehicle infraction, however, must "last no longer than reasonably necessary to effectuate the purpose of the stop." ***Commonwealth v. Ciaramitaro***, 51 Mass. App. Ct. 638, 643 (2001). ***Commonwealth v. King***, 389 Mass. 233, 244 (1983) (once officers approached car, they were required to complete the parking citation process and, barring other reasons to detain occupants, leave them free from further police restraint).

### **2<sup>nd</sup> Issue: Were the exit order and subsequent pat-frisk lawful?**

Although the initial stop was valid, the Court determined that the exit order and pat-frisk were not. For an exit order to be lawful, an officer is not required to point to specific facts that the occupants are armed and dangerous. Rather the officer needs to demonstrate that based on the totality of the circumstances there was a "reasonable suspicion of danger" that would warrant an objectively reasonable officer to secure the scene in a more effective manner by ordering the occupants out of the vehicle. ***Commonwealth v. Feyenord***, 445 Mass. 72, 75-76 (2005), cert. denied, 546 U.S. 1187 (2006). See ***Commonwealth v. Cardoso***, 46 Mass. App. Ct. 901, 902 (1998) (fidgeting around and avoiding eye contact were not enough to order an operator out of car). Here, the trooper did not observe any furtive movements, weapons, contraband, or other activity to suggest that there was criminal activity or danger to the officers or others. With regard to the status of the defendant's license, there is nothing in the record to indicate it was invalid. "The fact that the minivan was a rental vehicle and that the defendant's name was not on the agreement was not addressed. The defendant's nervousness also did not justify the exit order. Once the defendant produced his license, the

vehicle registration, and the rental agreement, the defendants should have been permitted to leave.

The Commonwealth argued that there are several considerations in combination that support a reasonable belief that there was criminal activity: the odor of marijuana, the presence of air fresheners, and the nervousness of the defendants warrant a reasonable suspicion of criminal conduct alone or together. See **Cruz**, supra at 468-469, 474-476 (exit order not supported by reasonable suspicion where driver of illegally parked vehicle was smoking small, inexpensive cigar commonly known to mask odor of marijuana smoke, officer detected faint odor of marijuana, and driver and front seat passenger appeared to be nervous). The Court wrote that it was constrained to affirm the motion due to prior case law.

### **3<sup>rd</sup> Issue: Was the “very strong” odor of unburnt marijuana an indicator that there were larger quantities of marijuana present?**

The Court held that the odor of unburnt, rather than burnt, marijuana could be more consistent with the presence of larger quantities. However, the SJC has previously held “that a very strong odor cannot reliably predict the presence of a criminal amount of the substance, that is, more than one ounce, as is required to constitute probable cause.” The Commonwealth contends that there was more than the mere odor of marijuana in this case that would support probable cause. “The SJC’s decisions rest on the idea that one cannot reliably determine weight from smell alone.” Here, the smell of marijuana was “very strong” and that should have been enough to support a reasonable suspicion, or probable cause, that a criminal amount of marijuana was present.” Unfortunately, the Appeals Court found that the “two observations alone, do not add up to probable cause and therefore searching the minivan under the automobile exception was not valid. The fact that driver’s name was not on the rental agreement adds nothing to the equation.” Furthermore, the lack of evidence to indicate the drug detection dog was trained to discern whether the marijuana weighed over of an ounce also failed to assist the Commonwealth’s argument.

## **Searching a Motor Vehicle After a Stop**

### ***Pretext Stops and Subsequent Searches***

**Commonwealth v. Juan Eladio Ortiz**, 88 Mass. App. Ct. 573 (2015): The Drug Enforcement Agency, “DEA” suspected the defendant, Juan Eladio Ortiz, was involved with cocaine trafficking and therefore it was conducting surveillance of him. The DEA learned that the defendant had a suspended Massachusetts driving license and could be arrested at any time for driving a motor vehicle within the Commonwealth.

In February 2013, the DEA learned that the defendant would be transporting 1 kilo of cocaine while traveling from Norwood to Boston. The DEA contacted the Massachusetts State Police and asked if they observed the defendant driving a motor vehicle and committing any infractions, they stop it. DEA agents alerted the state police that they observed the defendant leave his residence in Norwood with a black backpack. At some point, one of the troopers was on patrol, near the VFW Parkway, stopped the defendant when he switched lanes without signaling. The trooper arrested the defendant and impounded his vehicle. During a warrantless inventory search, the trooper opened a black backpack in the vehicle and discovered cocaine. The defendant was arrested and later filed a motion to suppress. The

motion was allowed because the judge found that the trooper “undertook the inventory search, after stopping and arresting the defendant, as a pretext to conduct a search for investigative purposes.” The trooper testified that he “would not have stopped the defendant for changing lanes nor would he have arrested someone for operating without a suspended license,” but for the instructions he received from the DEA. The issue the Appeals Court considered was whether a state trooper’s post-arrest warrantless inventory search of a motor vehicle’s contents was proper and if the trooper lawfully stopped and arrested the driver for a suspended license.

**Conclusion:** The Appeals Court affirmed the allowance of the motion to suppress and found that the search of the backpack was unconstitutional because it was done as pretext.

“The distinction between an inventory search and an investigatory search is to gather evidence, whereas an inventory search is conducted for the purposes of safeguarding the car or its contents, protecting the police from claims of misappropriation, protecting the public against the possibility that the car might contain weapons or other dangerous instrumentalities that might fall into the hands of vandals or a combination of such reasons.” **Commonwealth v. Baptiste**, 65 Mass. App. Ct. 511 (2006).

An inventory search will not be upheld if there is a suggestion that the standard procedure is a pretext concealing an investigatory police motive. **South Dakota v. Opperman**, 428 U.S. 364 (1976). Here the DEA agents suspected the defendant was transporting cocaine and they prearranged the defendant’s arrest for minor motor vehicle infractions. The trooper testified during the motion hearing that he would not have stopped the vehicle but for the directive he had received from the DEA. Here, the Appeals Court concluded that the purpose of the search was to conduct an investigation and did not qualify as an inventory. The inventory search was a pretext for using the inventory policy to conduct an investigatory search of the backpack and thus was unconstitutional. The Commonwealth’s contention that the search of the vehicle was an inventory search was also defeated by the fact the police enlisted the assistance of a canine unit in conducting the search.

- ❖ **TRAINING TIP:** One issue that was not addressed concerned whether a defendant lacks a reasonable expectation of privacy in a rental vehicle.

***The Appeals Court holds that police were not justified in searching the backseat armrest of a vehicle after safety concerns dissipated post exit order and pat-frisk.***

**Commonwealth v. Meneide**, 89 Mass. App. Ct. 448 (2016): The Appeals Court affirmed the motion judge’s decision suppressing a handgun found in the backseat armrest and found the following:

- a. **The exit order, pat-frisk and initial limited search of the vehicle were valid; and**
- b. **The subsequent search of the backseat armrest exceeded the scope of a protective frisk.**

The defendant, Jerry Meneide, was driving a small four sedan in Brockton when State police observed him looking side to side and talking on a cell phone. Although the troopers were not familiar with the defendant, they followed him as he drove towards an apartment complex. Recently, many drug sales had been taking place in the parking lots of commercial establishments in the area. The troopers stopped the defendant after he drove through a red light. As the troopers approached, they observed the defendant lift his buttocks six inches and believed the defendant's movements were consistent with him placing his left hand under his buttocks. The troopers were concerned the defendant was trying to conceal something beneath him, presumably contraband such as narcotics or weapons.

When the trooper asked the defendant for his license and registration, the defendant complied and was calm during the encounter. There was an overwhelming odor of unburnt marijuana and air fresheners emanating from the car, which the defendant acknowledged he had "a little weed." The troopers ordered the defendant out of the vehicle and conducted a pat-frisk. A packet of marijuana was found in the defendant's jacket pocket, and a smaller one was located in the pocket of his pants. The two packets weighed less than an ounce and the trooper did not intend to apply for a criminal complaint for possession. After the trooper found nothing when he searched the area of the driver's seat and opened the driver's side door. When the trooper pulled down the back center armrest, he discovered a gun.

The defendant was charged with unlawful possession of a firearm and filed a motion to suppress. After a hearing, the motion judge concluded that the police validly stopped the motor vehicle and lawfully issued an exit order based on safety concerns. The judge denied the motion with respect to the marijuana, but allowed the suppression of the firearm discovered during the search of the vehicle and the suppression of the statements the defendant made to police.

**Conclusion:** The Appeals Court held that the police were justified in issuing an exit order and conducting a pat-frisk for safety concerns. However, the police exceed the scope of the search when they searched the backseat of the vehicle.

**1<sup>st</sup> Issue: The exit order, pat-frisk, and initial limited search were lawful.**

The Appeals Court held that the troopers had reasonable safety concerns to justify the exit order, pat-frisk, and limited search of the immediate area where the defendant was seated. With regard to the exit order, the Appeals Court found that the "defendant's unusual action of lifting himself off the seat by six inches" in a manner consistent with concealing something was sufficient to justify the exit order and pat-frisk. "The officer does not need to know the exact nature of the object being concealed in order to trigger a safety concern." ***Commonwealth v. Haynes***, 83 Mass. App. Ct. 903 (2013). "There is no blanket rule that a driver who conceals something when officers stop him is presumed to be concealing drugs rather than a weapon." The exit order and pat-frisk of the defendant were proportionate to the suspicions that he "had concealed a weapon beneath himself or in a back pocket."

**2<sup>nd</sup> Issue: Did the police exceed the scope of the search?**

The Appeals Court found that the search became excessive when no weapon was found during the pat-frisk or in the immediate area where the defendant was seated. The search

must be limited to where a suspect may be able to gain possession of a weapon. For example, police were justified in opening a locked glove compartment after they observed the defendant lock the glove compartment while the police approached. ***Commonwealth v. Graham***, 78 Mass. App. Ct. 127 (2010). The Court cited examples where police were justified in making a limited search based on the defendant's actions. When a defendant twists his body to the right, a protective search was limited beneath the defendant's seat. ***Commonwealth v. Almeida***, 373 Mass. 272 (1977). Similarly, when a defendant leaned forward and down to retrieve his registration from a glove compartment, police were justified in looking inside the console and glove compartment for safety measures. ***Commonwealth v. Lantigua***, 38 Mass. App. Ct. 526 (1995). The scope of a protective search within the interior of an automobile must be limited by, and rationally connected to, a safety concern about the particular area to be searched.

The Appeals Court did not agree with the Commonwealth's argument that the small size of the vehicle made it possible for the defendant to reach into the backseat armrest. Unless there is a safety issue, the possibility that a defendant could reach into a particular area of a vehicle without any evidence is not persuasive. Furthermore, the Appeals Court stated that there are no cases that "have applied the concept of wing span when defining the scope of such searches. Here, the defendant made no movement towards backseat armrest and there was no indication that a weapon was concealed there. The defendant was cooperative and calm while interacting with the troopers. Based on all these factors, searching the backseat armrest was unlawful.

***The SJC holds that the police had probable cause to search the trunk of a vehicle for a firearm under the automobile exception!***

***Commonwealth v. Ariel Hernandez***, 473 Mass. 379 (2015): Police received a report of an armed robbery involving two Hispanic male suspects that drove away in a Honda Civic. Six hours after the robbery, Officer Hanson of the Lowell PD observed a vehicle matching the description. Officer Hanson approached the vehicle with another officer. The defendant, Ariel Hernandez, was loud and belligerent and questioned why police. The defendant was "moving around" in the driver's seat and then reached for the center console. Two officers pulled the defendant out of the vehicle and handcuffed him. The passenger was also handcuffed for safety reasons. Police searched the vehicle and did not find any weapons or contraband. When no weapons or contraband were found, police opened the trunk and recovered the handgun. The officers searched the vehicle, and after finding no weapons or contraband in the passenger's compartment, they opened the trunk and found a handgun. Officer Hanson testified that they had searched the trunk because they were looking for the firearm involved in the earlier armed robbery. Shortly afterwards, one of the robbery victims was brought to the scene for show up **identification**. The victim identified the defendant as one of the robbers. Specifically, Officer Hanson testified that the victim said that the defendant was standing "next to the man that was holding the gun with the hood or a mask over his face" during the robbery. The police arrested the defendant on firearms charges and his companion for armed robbery.

The defendant filed a motion to suppress the firearm and argued that the police conducted a warrantless search and the search exceeded the bounds of a proper inventory search. The motion judge concluded that the search was justified under the automobile

exception to the warrant requirement because there was enough evidence to, "warrant a man of reasonable caution in the belief that the handgun would be in the vehicle, perhaps in the trunk and out of sight." **Carroll v. United States**, 267 U.S. 132, 162 (1925). The judge also determined that the 6 hour time frame had passed between the robbery and the automobile stop were not fatal where "it was reasonable to think that one or both of the occupants at the time of the stop had probably been using the vehicle at the time of the robbery," the occupants of the vehicle "fit the very general description of the robbers," and a handgun had been used in both the robbery and the later home invasion. Based on all these factors, the police had "ample probable cause" to search the entire vehicle, including the trunk, after the show-up identification, where one of the victims identified the defendant as one of the robbers.

**Conclusion:** The Appeals Court affirmed the denial of the motion to suppress under the theory of the "automobile exception." A warrantless search of an automobile is permissible "where the police have probable cause to believe that a motor vehicle parked in a public place and apparently capable of being moved contains contraband or evidence of a crime." **Commonwealth v. Bostock**, 450 Mass 616, 624 (2008).

"Under the automobile exception to the warrant requirement, the search of a motor vehicle is reasonable and permissible where probable cause exists to support the search." **Commonwealth v. Johnson**, 461 Mass. 44, 49 (2011). Here Officer Hanson had information before him, which gave him probable cause to search the trunk. **Commonwealth v. Cast**, 407 Mass. at 895. The information supporting probable cause included the following factors:

- a robbery involving a firearm occurred at 8:30 to 8:45 P.M.;
- the vehicle involved in the robbery was a green Honda Civic sedan, bearing a specified license plate number, and with a Dominican Republic flag hanging from the rear view mirror;
- the perpetrators were described as two Hispanic males;
- an armed home invasion, where two people were shot, occurred approximately five hours after and approximately fifty yards from the armed robbery;
- a vehicle matching the exact description of the vehicle used in the armed robbery was going in the general vicinity of the two crimes approximately six hours after the robbery;
- the vehicle changed direction after the police cruiser approached, turning 180 degrees from its original direction;
- the vehicle failed to stop at a stop sign after the police cruiser approached;
- the occupants of the vehicle were two Hispanic-appearing males;
- the driver of the vehicle was belligerent and made furtive gestures; and
- no weapons or contraband were located inside the interior of the vehicle.

The sum of the information known to police formed a sufficient basis on which to search the entire vehicle, including the trunk, because the officers could have appropriately concluded that the vehicle used in the armed robbery, occurring hours prior in the same general proximity to the location of the stop, contained evidence of that crime. Even if the police lacked probable cause under the automobile exception or otherwise performed an illegal search, the inevitable discovery doctrine would have applied and the discovery of the handgun would have been discovered.

**Inevitable discovery validates the search of a vehicle which would have to be towed and inventoried.**

***Commonwealth v. Michael Ubeliz***, 88 Mass. App. Ct., 814 (2015): In January 2010, Burlington police received a report that two suspects had left a Wendy's parking lot in a van with the victim's cell phone that they had stolen. The victim obtained the vehicle's license plate and used her Global Positioning System (GPS) tracker to locate her cellphone from Woburn to Burlington.

After looking up the license plate, police learned that the vehicle's registration was revoked. Burlington Officer Peter Abaskharoun was on patrol, when he observed a vehicle matching the description that he had received from dispatch. As the vehicle passed him, he conducted a "felony stop," with his gun directed at the vehicle. The defendant Peter Ubeliz, who was driving, exited the vehicle and complied with Officer Abaskharoun's orders. Officer Abaskharoun did not recover any weapons after conducting a pat-frisk of the defendant. However, Officer Abaskharoun did see "two purses in plain view," inside the motor vehicle. The purse matched the description of the victim's purse. Since both the defendant and the passenger were males, presumably the purses did not belong to them.

In addition to recovering a tan purse with a female's identification behind the driver's seat, Officer Abaskharoun also found laptops, GPS units, cellphones and tools to punch out a car window pane including a screw driver. Because there were too many items to inventory, the vehicle was towed to the Burlington Police Department where an inventory search was conducted in accordance with the Burlington Police Department's Inventory Policy. The victim did identify her purse and the defendant was ultimately convicted of two counts of receiving stolen property having a value greater than \$250, G. L. c. 266, § 60; and one count each of possession of a burglarious instrument, G. L. c. 266, § 49; receiving a stolen credit card, G. L. c. 266, § 37B(b); improper use of a credit card, G. L. c. 266, § 37B(f); forgery of a document, G. L. c. 267, § 1; uttering a false writing, G. L. c. 267, § 5; and operating a motor vehicle with a suspended registration, G. L. c. 90, § 23. The defendant filed an appeal and argued that (1) police did not have probable cause to believe he had committed a crime when he was arrested and therefore the search incident to arrest was invalid and (2) the inevitable discovery exception does not apply in this case.

**Conclusion:** The Court affirmed the convictions and concluded that the inevitable discovery exception did apply. The Court did not address whether searching the motor vehicle was valid as a search incident to arrest.

### 1st Issue: Does the inevitable discovery doctrine apply?

The Court determined that the inevitable discovery doctrine applies in the underlying case by relying on the two step analysis that was established in **Commonwealth v. O'Connor**, 406 Mass. at 117. Pursuant to **O'Connor** inevitable discovery exception applies when two prongs are met:

- (1) evidence is discovered by lawful means and
- (2) police were not acting in bad faith to discover evidence.

With regard to the first prong, the Court determined that the purses and other stolen items would have been discovered as a practical matter. There was no dispute that the police had sufficient grounds to stop the defendant's vehicle based on the officer's knowledge that the registration was revoked. Inevitability is determined by the "circumstances existing at the time of the unlawful seizure." **Id**, 406 Mass. at 117. Here, Officer Abaskharoun knew that the registration was revoked before he stopped the vehicle. Pursuant to G. L. c. 90, § 9, an unregistered vehicle cannot be operated, nor can it be allowed to remain on any way. The statute specifically states:

***No person shall operate, push, draw or tow any motor vehicle or trailer, and the owner or custodian of such a vehicle shall not permit the same to be operated, pushed, drawn or towed upon or to remain upon any way . . . , unless such vehicle is registered in accordance with this chapter."*** G. L. c. 90, § 9.

As a "practical matter," police had to impound the vehicle because the revoked registration prevented the defendant from operating the motor vehicle. Second, leaving the vehicle on the side of the road was not an option because it was stopped on a busy roadway. Based on the circumstances, the Court found that the first prong of the inevitable discovery analysis in **O'Connor** was satisfied. Also, the defendant never raised any challenges regarding the procedure for inventorying the vehicle.

The second prong of the **O'Connor** analysis examines whether the police were acting in bad faith to discover evidence which would result in a constitutional violation. **Commonwealth v. Perrot**, 407 Mass. 539 (1990). Unlike **Perrot** and **O'Connor** the police in this case were not trying to circumvent the warrant requirement nor were they acting in bad faith. Rather the defendant argues the second prong was not satisfied because the police used excessive force when they stopped his vehicle and ordered him out of the vehicle with their guns drawn. The defendant compared the circumstances in his case to what had transpired in **United States v. Rullo**, 748 F. Supp. 36 (1990). In **Rullo**, the police physically beat the defendant after they believed he had fired a gun at them and he would not disclose where the gun was located. The judge in **Rullo** held that the inevitable discovery exception did not apply because "the gun's discovery was not independent of the police misconduct and the search was conducted by the same officers who beat the defendant." Second, the application of the inevitable discovery doctrine in **Rullo**, "encouraged law enforcement to believe they could avoid the burden of a prolonged search by physically abusing the suspect, without significant risk of losing the admissibility of any physical evidence."



Similar to the analysis in **Rullo**, the Court examined whether the police action was done in bad faith or designed to obtain evidence without a warrant. However, there is no evidence that Officer Abakharoun acted in bad faith. Furthermore, **Rullo** used the First Circuit's standard rather than the **O'Connor** analysis. After considering all the facts, the Court found that the second prong of the **O'Connor** analysis was satisfied and therefore the evidence recovered from the vehicle was lawful under the inevitable discovery exception.

**2<sup>nd</sup> Issue: Can a misdemeanor of operating a motor vehicle with a suspended registration be arrestable, and if yes, can police conduct a search incident to arrest?**

The Court did not address this issue on appeal but offered some guidance as to whether a charge of operating a motor vehicle with a revoked registration in violation of G.L. c. 90 §23 could be an arrestable offense. In the circumstances where it is arrestable, the Court considered whether the police could have searched the motor vehicle as a search incident to arrest.

First the Court examined whether a search incident to arrest would have been lawful based on the operating a motor vehicle with a revoked or suspended registration. There is no statutory right of arrest for the above charge because it is a misdemeanor. However, a police officer can make a warrantless arrest for a misdemeanor only where (1) involves a breach of peace, (2) is committed in the presence or view of the officer and (3) is still continuing at the time of the arrest or only interrupted so that the offense and the arrest form parts of one transaction." **Commonwealth v. Gorman**, 288 Mass. 294 (1934). Based on the facts of this case, there was no indication that the defendant was committing a breach of peace by the way he was driving or had any other disturbing effect on the public.

Aside from the absence of a breach of peace, there are two additional reasons why the police would not have been justified in searching the motor vehicle as a search incident to arrest. "The purpose of a search incident to arrest is to prevent an individual from destroying or concealing evidence of a crime for which police have probable cause to arrest or to prevent an individual from gaining access to weapon to resist arrest or escape." **Commonwealth v. Santiago**, 410 Mass. 737 (1991). Because the defendant was handcuffed and kneeling outside the vehicle, it was unlikely that the defendant could reach for a weapon. Furthermore, based on the offense of operating a motor vehicle with a revoked registration, police were not likely to find evidence related to offense in the vehicle. Since the offense was not arrestable, the defendant was not in reach of the vehicle and there was no reason to believe evidence of the offense would have been recovered from the van a search incident to arrest, it would have been unlawful.

- ❖ **TRAINING TIP:** This case serves as a good review of the inevitable discovery exception as well as addressing the whether a misdemeanor, not included in the provision of GL c. 90, § 21, is arrestable pursuant to common law. Second, the Court provides some guidance related to a search incident to arrest.

### ***III. Motor Vehicle Inventory Searches***

#### **Standards for an Inventory Search**

The United State Supreme Court held that the contents of a lawfully impounded vehicle may be inventoried without a warrant as part of a standardized **administrative procedure**. See **Colorado v. Bertine**, 479 U.S. 367 (1987); and **South Dakota v. Opperman**, 428 U.S. 364 (1976).

The rational for inventory searches is based upon non-investigatory reasons:

- Protecting the person's property;
- Protecting the police from claims of theft;
- Protecting the police and the public from dangerous items.

See **Commonwealth v. Matchett**, 386 Mass. 492 (1982).

**Commonwealth v. Tisserand**, 5 Mass. App. Ct. 383 (1977): If the impoundment is proper, evidence of criminal activity will not be suppressed even if officers conducting an inventory have a contingent suspicion that the vehicle contains incriminating evidence.

**Commonwealth v. Baptiste**, 65 Mass. App. Ct. 511 (2006): Officers conducting an inventory who observe items that provide probable cause to believe that the vehicle contains evidence of a crime may then conduct an investigatory search of the vehicle based upon probable cause.

**Commonwealth v. Benoit**, 382 Mass. 210 (1981): If the primary motive of the inventory is an investigative search for evidence rather than the performance of administrative duties, evidence uncovered during the inventory will be suppressed.

#### ***Requirement of a Written Inventory Policy***

**Commonwealth v. Bishop**, 402 Mass. 449 (1988): The SJC ruled that the inventory procedure must be in writing and police procedures can be considered standard only if they are in writing.

**Commonwealth v. Peters**, 48 Mass. App. Ct. 15 (1999): If the police policy is to conduct an inventory of both the vehicle and the person of the arrestee, then the written inventory policy should specifically authorize the search of both the vehicle and the arrestee.

#### **The Scope of an Inventory Search**

The written policy defines the scope of the inventory.

**Commonwealth v. Caceres**, 413 Mass. 749 (1992). The scope of the inventory may extend to the contents of any unlocked, but closed container.

***Absence of specific guidelines related to closed containers must be left untouched during an inventory search.***

Without specific written guidelines, the contents of any closed container, even if unlocked, must be left undisturbed. See ***Commonwealth v. Muckle***, 61 Mass. App. Ct. 678, 684 (2004) (inventory procedure could have, but did not authorize the opening of closed, but unlocked containers).

***Commonwealth v. Difalco***, 73 Mass. App. Ct. 401 (2008): Whether an inventory policy might lawfully permit the opening of a locked container is undecided under Massachusetts law. "There is no explicit authority for the police to unlock a closed container and inventory the contents, and that the officer in this case could do no more than inventory a locked container as a single unit. The Appeals Court made it clear that, if police open a closed container during an inventory search in the absence of a specific written procedure requiring them to do so, then any evidence they discover in the container must be suppressed."

***Commonwealth v. Figueroa***, 412 Mass. 745 (1992): the SJC held that an inventory procedure could extend into an open wall panel inside a passenger compartment. The Court held that police department's policy stated, "An inventory listing of personal items and valuable will extend to all storage areas and compartments that are accessible to the operator and / or passengers. This encompasses all open areas, including the area under the seats, the glove compartment and other places where property is likely to be held."

The Court stated, "We think it clear that the officers stayed within the confines of this language when looking into the area behind the wall panel because that area was an 'open area' at the time the officers conducted their search."

***Alternatives to Impounding a Motor Vehicle***

***Commonwealth v. Garcia***, 409 Mass. 675, 678 (1991): "The propriety of the impoundment of the vehicle is a threshold issue in determining the lawfulness of the inventory search."

***Commonwealth v. Crowley-Chester***, 86 Mass. App. Ct. 804 (2014): Reasonableness, rather than necessity, is the governing standard for evaluating the propriety of an impoundment and subsequent inventory search of a vehicle.

***Commonwealth v. Daley***, 423 Mass. 747, 750 (1996): "The impoundment of a vehicle for non-investigatory reasons is generally justified if supported by public safety concerns or by the danger of theft or vandalism to a vehicle left unattended." When a defendant's vehicle is unregistered and uninsured, the police have no alternative but to impound it and have it towed.

***Commonwealth v. Brinson***, 440 Mass. 609 (2003): Where an arrestee's vehicle is legally parked in a privately owned lot and represents no safety hazard or risk of theft or vandalism, an impoundment and inventory of the vehicle cannot be justified on the mere basis of the defendant's arrest.

***Commonwealth v. Allen***, 76 Mass. App. Ct. 21 (2009): The Court concluded that opening a closed book bag and opening an unlocked container found inside was lawful. The key factor in

this case was that the department inventory policy specifically stated that "all unlocked containers shall be opened and their contents inventoried."

**Commonwealth v. Figueroa**, 412 Mass. 745 (1992): The Court found that plain observation and seizure of drugs behind cardboard panel in vehicle door was lawful and in accordance with the Department's policy regarding inventory searches.

**Commonwealth v. Alvarado**, 420 Mass. 542 (1995): Using a K-9 unit while conducting an inventory search was prohibited because it transformed an inventory search into an investigatory search. Police may conduct an inventory of the contents of the automobile in accordance with standard, written department procedures.

***The Court held that police need to consider a reasonable alternative to impounding a motor vehicle!***

**Commonwealth v. Oliveira**, 474 Mass. 10 (2016): In March 2014, the defendants, Mitchell Violet, and Jemaul Oliveira, were detained after they attempted to leave a store without paying for merchandise. When Dartmouth Police arrived, they asked the defendants how they had arrived at the store. Violet replied that he had driven "his" motor vehicle that was registered in his girlfriend's name. The police asked if they could search for a bag of merchandise in the vehicle that was taken from the store. Violet gave the police the keys and they found a bag. Once the police verified that the merchandise was stolen, they arrested Violet and Oliveira for shoplifting. The police told Violet that the vehicle would be inventoried and towed. Violet and Oliveira became "visibly agitated," and stated that he preferred his girlfriend, the registered owner of the vehicle, to come and pick it up rather than to have it towed. The police called for a tow even though the car was lawfully parked in the mall lot. During the inventory search of the vehicle, police discovered a loaded firearm in an unlocked glove compartment. Violet and Oliveira were charged with shoplifting by concealing merchandise, in violation of G. L. c. 266, § 30A, and unlawfully carrying a firearm, in violation of G. L. c. 269, § 10 (a).

Oliveira and Violet filed a motion to suppress arguing that the seizure of the vehicle was unreasonable in light of Violet's request for his girlfriend to retrieve the vehicle. The motion was allowed because the seizure of the vehicle was deemed unreasonable since the owner should have been permitted to get it.

**Conclusion:** The SJC affirmed the allowance of the motion to suppress and concluded that where the driver had offered the police an alternative to impoundment that was lawful and practical under the circumstances, it was unreasonable and thus unconstitutional to impound the vehicle and conduct an inventory search.

**1st Issue: Was the seizure of the vehicle reasonable?**

Under the United States and Massachusetts Constitutions, an inventory search is lawful only if the initial seizure (or impoundment) of the vehicle was reasonable, see **Commonwealth v. Ellerbe**, 430 Mass. 769, 776 (2000) ("guiding touchstone" is reasonableness); and, second, the search of the vehicle that follows its seizure was conducted

in accord with standard police written procedures, see **Ellerbe**, supra at 773 n.8. See **Commonwealth v. Brinson**, 440 Mass. 609, 612 (2003) ("A lawful inventory search is contingent on the propriety of the impoundment of the car").

A vehicle may be seized for one of four (4) legitimate purposes:

- a. to protect the vehicle and its contents from theft or vandalism, See **Ellerbe**, 430 Mass. at 775;
- b. to protect the public from dangerous items that might be in the vehicle, see **United States v. Coccia**, 446 F.3d 233, 240 (1st Cir. 2006)
- c. to protect public safety where the vehicle, as parked, creates a dangerous condition, see **Brinson**, 440 Mass. at 615-616; **Commonwealth v. Henley**, 63 Mass. App. Ct.1, 5-6 (2005); or
- d. where the vehicle is parked on private property without the permission of the property owner as a result of a police stop, to spare the owner the burden of having it towed. If the true purpose for searching the vehicle is investigative, the seizure of the vehicle may not be justified as a precursor to an inventory search, and must instead be justified as an investigative search. See **Commonwealth v. White**, 469 Mass. 96, 102 (2014); **Commonwealth v. Vuthy Seng**, 436 Mass. 537, 551-555 & n.16 (2002).

If the vehicle is seized for a legitimate purpose, it will have to be determined "whether the seizure was reasonably necessary based on the totality of the evidence. Some of the factors courts consider are:

- a. Was the driver is arrested?
- b. Could the vehicle be left in the place it was parked?
- c. Did the driver choose where to park the vehicle?
- d. Where did the driver park the vehicle (lawful spot on street, driveway, parking lot open to the public.

The Commonwealth must show that it would have been unreasonable to have allowed the vehicle to remain where the driver chose to park it." See **Commonwealth v. Brinson**, 440 Mass. 609, 610 (2003) ("the government may not impound and conduct an inventory search of a car based on the arrest of the owner, where the car was lawfully parked in a privately owned parking lot [by the owner] and there was no evidence that the car constituted a safety hazard or was at risk of theft or vandalism")."

"Where the vehicle reasonably could not have been left in the place it was parked, the Court will consider whether the owner of the vehicle or a person clearly authorized by the owner to drive the vehicle was present and lawfully able to drive the vehicle away. If not, the Court will have to determine whether the owner or authorized driver offered the police a lawful and practical alternative to impoundment of the vehicle." **Commonwealth v. Ellerbe**, 430 Mass. 769, 774 (2000); **Commonwealth v. Caceres**, 413 Mass. 749, 751 (1992).

Here, the police officer's seizure was unreasonable because the vehicle was lawfully parked in a public parking lot and there was no concern that the vehicle could be stolen or vandalized. Additionally, Violet offered to have his girlfriend, the true owner of the vehicle retrieve it. Lastly, the vehicle was not obstructing other vehicles or creating a risk to public safety.

If the vehicle was properly seized, then the SJC would have examined whether police followed their departmental policy when conducting an inventory of the vehicle. Since the police verified whether the defendant was authorized to drive his girlfriend's vehicle, or whether the vehicle was properly registered to her, it would have been reasonable to leave the vehicle parked. Based on the totality of the circumstances, the SJC found the seizure of the vehicle and subsequent inventory search were unlawful.

***Commonwealth v. Crowley-Chester***, 86 Mass. App. Ct., 804 (2015): The Court denied the motion to suppress and found that since there was both a public safety and vandalism/property damage rationales supported the impoundment of the Honda and its inventory search pursuant to the written Springfield police policy. The motion judge applied the wrong legal standard in this case and therefore the allowance of the motion must be reversed.

NARRATIVE FOR PATROL PETER CANUEL

Ref: 13-124-AR

On Monday March 18, 2013 I was assigned to Area 5 on the 4-12 relief. At approximately 1637 hrs. Officer /, Morency, J. Rapoza, R. St. Dennis and I were dispatched to Kohl's Department store located at 81 Faunce Corner Rd. for a report of two males shoplifters that Loss Prevention was about to apprehend near the exit doors. In route to that location Dispatch stated Loss Prevention reported one of the males had cut open the packaging to two cologne bottles with a pocketknife.

Upon arrival Officer V. Morency, Rapoza and St. Dennis were on scene in the Loss Prevention Office. Officer Morency informed me that the males identified as **Jemaul Oliveira (dob [REDACTED])** and **Mitchell Violet (dob [REDACTED])**. Both parties were placed in handcuffs (double locked and checked for proper fit). Both parties were frisked for weapons. Officer V. Morency located a small pocketknife (Smith & Wesson color black) inside Violet's front right pocket. Officer Morency advised both parties of their Miranda warnings. Both parties stated they understood their rights and would cooperate.

At this time I spoke to Loss Prevention Associate, Michael J. Sylvia, who stated he observed thru CCTV both Oliveira and Violet enter the store and walk toward the fragrance section. Sylvia stated he observed Violet select two bottles of cologne (CK Free and Rocawear valued at \$61.00) and cut the packages open with a small pocketknife. Sylvia then stated Violet then concealed both bottles of cologne in his front shirt pocket. Sylvia then stated both males then walked over toward the mens clothing. Sylvia stated he observed Oliveira select an Adidas shirt (\$28.00) and Adidas socks (\$15.00). Sylvia stated Oliveira then concealed the items of clothing in his front pants pocket. Sylvia stated Violet then selected t-shirts and shorts from its display. Sylvia stated both parties then walked toward the register and Violet paid for the t-shirts and shorts but failed to pay for the concealed merchandise. Sylvia stated both males then exited the store.

Sylvia stated he approached both suspects and identified himself from loss prevention. Both parties agreed to return to the Loss Prevention office. Sylvia stated the two bottles of cologne were recovered from Violet's front shirt pocket and the two articles of clothing were recovered from Oliveira's front pants. A 9mm bullet was also located in the front left pocket of Oliveira's pants. I demanded Oliveira to produce a license to carry or an FID card. Oliveira replied "I don't have one." I asked Oliveira "Where did you get the round from?" Oliveira stated he found it on the ground across from his house at the VFW on Park St. in New Bedford. At this time I advised both males they were under arrest for the charge of shoplifting by concealing merchandise 266-30A. At this time Officer Morency asked Violet "How did you get here?". Violet stated they came in his car. Violet stated the car was registered in his girlfriend's name but it was his car. Officer V. Morency asked Violet if there were any stolen items in his vehicle. Violet stated there is a bag of t-shirts and shorts that he had purchased earlier. Officer V. Morency asked for permission to check the vehicle for any further articles from clothing. Violet agreed to let Officer Morency check the Kohl's bag inside the vehicle. Officer Morency and Officer St. Dennis went to the parking lot to locate the vehicle. The vehicle was Ma. reg. 974RN2, a 1997 Honda Accord color purple. At this time Officer Morency obtained the Kohl's bag in plain view in the rear seat of the vehicle. Officer Morency did not see a receipt in the bag for the t-shirts and shorts. Officer Morency brought the bag back to the loss prevention Office.

At this time a receipt for the t-shirts and shorts that Violet had purchased was retrieved on his person. After obtaining a statement from Sylvia I advised Violet that his car would be towed and an inventory would be done on the vehicle. At this time both Violet and Oliveira became agitated and appeared nervous. Violet stated "You don't have to tow my car, my girlfriend can pick it up." I advised him that it would be towed. I confirmed with Sylvia

NARRATIVE FOR PATROL PETER CANUEL

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who spoke with Kohl's manager, Jason Strobel that he wanted the car towed off the property. At this time Officer Morency and Officer St. Dennis began to inventory the vehicle per policy.

During the inventory Officer St. Dennis located a black semi-automatic pistol in the glove box which was locked. The firearm was a Black Jennings Nine 9mm ser# 1360440. There were numerous 9MM rounds in the magazine (indetermined until processed). The firearm was secured in Officer St. Dennis cruiser. At this time I notified Sgt. Medeiros of the firearm. Sgt. Medeiros responded to the scene.

At this time I placed Violet in the rear of my cruiser. Officer St. Dennis then placed Oliveira in the rear of his cruiser. Both parties were transported to Dartmouth Police Headquarters. During the booking process Both Oliveira and Violet were afforded their rights to a phone call which they used several times. Sgt. Medeiros again asked Violet if he was in control of the vehicle most of the time. Violet stated " Yes it was my car". During the booking process. I asked Oliveira what time he had found the bullet. He stated he was at his girlfriends house at 55 Willis St. He stated he went outside to smoke a cigarette and found the bullet on the ground near the sidewalk by the VFW on Park st. Oliveira stated once he found the bullet he put it in his pocket then called his girlfriend to pick him up. Oliveira stated this was at approximately 1430-1500 hrs. on todays date 03/18/2013. Oliveira stated his girlfriend, then drove him to Kohl's and dropped him off so he could meet with Violet. I asked Oliveira for his girlfriends name to verify his story. Oliveira stated he did not want to give her name.

At this time Det. DeCosta and Det. Souza at this time then brought Violet to the interview room. Det. Costa advised Violet of his Miranda warnings and asked if he was willing to speak with him. Violet agreed and signed a waiver. Det. Decosta questioned Violet on their actions prior to the shoplifting. Violet stated Oliveira slept at his house. He stated they were together all day. He further stated both of them went to Kohl's together in the Honda. Det. Decosta inquired about the firearm located in the glove box. Violet stated " I have no idea how a firearm was in my glove box." Violet stated it was his vehicle and that he maintained control of it and repaired it. During the interrogation Violet continued to deny knowing how a firearm ended up in his glove box.

At this time Violet was brought back down to the booking area. Oliveira was then brought into the interview room. Det. Decosta advised Oliveira of his Miranda warnings. Oliveira agreed to talk with Det. Decosta. and signed a waiver. Oliveira stated he slept at his girlfriends house the night before. He stated he found the bullet at the VFW in New Bedford and placed it into his pocket. He stated his girlfriend brought him to Kohl's and dropped him off at approximately 1600 hrs. This was conflict from what Violet had stated earlier. Det. Decosta advised Oliveira of the firearm located in the vehicle. Oliveira stated " I don't know anything about a firearm in the glove box, It's not my car." Oliveira became agitated during the interview and declined to speak with the police once the firearm was mentioned. At this time the interrogation ended. While walking back to the booking room Oliveira continued to say, " This is Dartmouth is this the biggest case you have?" " You guys are not C.S.I. you can't put the gun on me." Oliveira continued to laugh.



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At this time I advised both parties they would be charged with Possession of the firearm 269-10J and the hoplifting. Oliveira was also charges with the Possession of the Ammunition ( 9mm bullet). Officer Souza ssisted in the booking process. The firearm and bullet was placed into the evidence locker for further processing. Jpon completion Oliveira and Violet were then transported to the House of Corrections in New Bedford to await release.

Respectfully Submitted,

Ptl. Peter Canuel

Det. Division to follow-up regarding the firearm.

## **HYPOTHETICAL**

**Officer Flynn stopped a motor vehicle for speeding. During the stop, the officer noticed that a torn piece of rug was lifted up and not properly secured. Police lifted the rug and found a hide. Were police authorized to do this?**

**ANSWER:** This hypothetical is based on an unpublished decision where the Appeals Court held that the search of a motor vehicle which included lifting up a torn piece of rug inside the vehicle was lawful.

**Commonwealth v. Mitchell**, Mass. Appeals Court – (Unpublished) No. 15-P-963, (2016): The Court held that the search of a motor vehicle which included lifting up the torn piece of a rug was lawful. The inventory policy required the officer to examine any ‘place’ in the car where valuables may be kept. The officer saw an anomaly in the rug, and knew from his training and past experience that goods or valuables could be hidden in such an area. After lifting the rug with a finger he was able to see the object in the hide. His search of the hide was authorized — and indeed required — by the inventory policy, was conducted in a reasonable manner, and was not unlawful.

Comparing this case to **Figueroa**, the defendant argues that the items seized in that case were in plain view in the car unlike what happened here. The written inventory policy in **Figueroa** allowed the search of ‘all open areas’ of the car. **Commonwealth v. Figueroa** 412 Mass. 745 (1992). When the police noticed that the interior wall panel immediately to the rear of the driver’s seat was detached from the wall, they proceeded to shine a flashlight into the gap and observed a brown paper bag wrapped in a clear bag, which led to the discovery of drugs. The Court, in **Figueroa** emphasized that the officers searched an open area of a car which was allowed in the inventory policy. In the underlying case, the inventory policy is not limited to open areas, and authorizes the search of any ‘place’ that could hold valuables.

Similarly, in **United States v. Jackson**, 682 F.3d 448 (6<sup>th</sup> Cir.), cert. denied, 133 S. Ct. 370 (2012), during an inventory search, police noticed ripped carpeting along the floor of driver’s seat. The officer moved the loose carpeting and discovered a firearm in a hide which was determined to be lawful because the written policy allowed ‘all interior areas’ of the vehicle to be searched. Here the officer acted reasonably and within the parameters of the inventory policy, when he lifted the carpeting to find out whether a hiding space was concealed beneath the carpet. The search was tailored to the policy and was ‘sufficiently tailored to only produce an inventory.’

## **IV. Miscellaneous Driving Issues**

### **The Driver Privacy Act of 2015**

On December 4, 2015, President Obama signed into law the Driver Privacy Act of 2015 which addresses privacy concerns for data collected on an event data recorder (EDR). The law states that any data collected by an EDR installed in a vehicle belongs to the owner or lessee of the vehicle in which the recorder is installed, regardless of when the vehicle was manufactured.

Data recorded or transmitted by an EDR may not be accessed by a person other than an owner or a lessee unless:

1. A court or other judicial or administrative authority having jurisdiction authorizes the retrieval of the data which is subject to the standards for admission into evidence;
2. An owner or a lessee of the motor vehicle provides written, electronic, or recorded audio consent to the retrieval of the data for any purpose;
3. The data is retrieved pursuant to a federal investigation or inspection, subject to limitations on disclosing the owner's personal identifiable information;
4. The data is retrieved for the purpose of determining the need for, or facilitating, emergency medical response in response to a motor vehicle crash; or
5. The data is retrieved for traffic safety research without disclosing the owner's personal identifiable information.

### **Potential Changes to Speed Limits**

**Chapter 218 of the Acts of 2016:** On August 8, 2016, the Governor signed into law **H. 4565 "An Act modernizing municipal finance and government,"** into law. Most of the bill does not apply to policing. However there are some new requirements added when filling out an electronic copy for a citation. Additionally, this bill allows towns and cities to lower speed limits.

**Definition:** "Citation," a notice, whether issued in handwritten form from a citation book or issued electronically and then printed on paper, upon which a police officer shall record an occurrence involving all automobile law violations by the person cited. Each citation shall be numbered and shall be in such form and such parts as determined jointly by the administrative justice of the district court department and the registrar.

**Regulations of Citations:** The Executive Office of Public Safety and Security shall promulgate rules and regulations establishing the standards required by this section for the issuance of electronic citations, including the proper equipment to be maintained by each department. In lieu of issuing citation books or in addition thereto, each police chief whose department issues citations electronically may grant authority to do so to each police officer of his or her department who has been trained pursuant to the regulations promulgated pursuant to this section.

- Citations can be issued manually or electronically.
- Any citations issued electronically shall deliver a copy to the police chief.
- If issues electronically, the department that issued the citation is required to retain the record.

- Mutilated or voided citations: Citations that are mutilated or voided may recovered or signed with an explanation to the police officer that issued the ticket. If any record of a citation issued electronically is spoiled, mutilated or voided, the record of such electronic citation, to the extent it can be recovered, shall be endorsed with a full explanation thereof by the police officer voiding such electronic citation and it shall be forwarded to the registrar in a manner approved by the registrar and the officer shall be prepared to account for the void in an electronic audit trail.
- Arrest: If an arrest is made and the citation is issued electronically, such notation of arrest shall be made on the printed copy and on any additional printed copies provided to the court and shall be made on the electronic record of the citation as agreed upon by the administrative justice of the district court and the registrar.

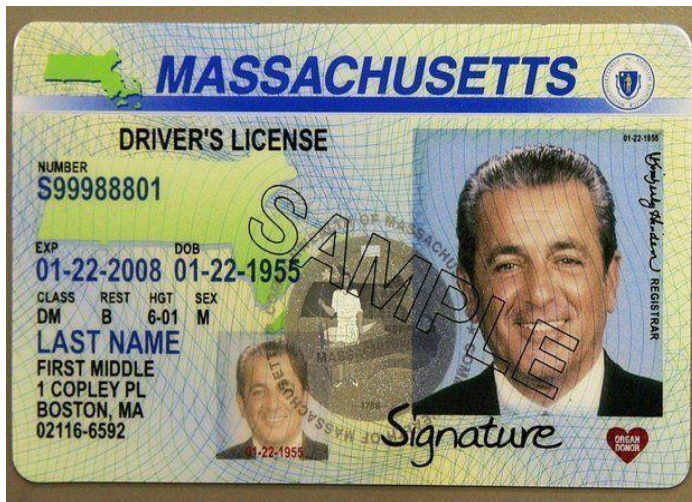
### **Lowering Speed Limits**

Notwithstanding any other general or special law to the contrary, the city council, the transportation commissioner of the city of Boston, the board of selectmen, park commissioners, a traffic commission or traffic director of a city or town that accepts this section in the manner provided in §4 of G. L. c. 4 may, in the interests of public safety and without further authority, establish a speed limit of 25 miles per hour on any roadway inside a thickly settled or business district in the city or town on any way that is not a state highway.

- City or town that changes the speed limit is required to notify the Mass DOT.
- Upon establishing a speed limit under this section, the city or town shall notify the department. The operation of a motor vehicle at a speed in excess of a speed limit established under this section.

### **The Real ID Act**

- Governor Baker signed legislation that will put Massachusetts drivers' licenses in compliance with the federal **REAL ID ACT**.
- Real ID compliant cards will begin to be issued in the fall of 2017.



**For Immediate Release:** 07/26/2016

**CONTACT:** Governor's Press Office 617-725-4025

#### Governor Baker Signs REAL ID Compliance Legislation

**BOSTON** – Governor Charlie Baker has signed bipartisan legislation to ensure Massachusetts' compliance with the federal REAL ID Act, while adopting public safety standards so the Commonwealth's citizens can continue to enter federal buildings and board domestic flights and ensuring that state credentials are issued to residents and those who are lawfully present in the United States. The RMV will continue to update customers throughout its compliance efforts and anticipates REAL ID compliant cards will begin to be issued in the fall of 2017.

"I thank the members of the Legislature for their attention to the Commonwealth's compliance with federal REAL ID security standards and ensuring that all applicants must show proof of lawful presence in order to obtain any Massachusetts credential," **said Governor Baker**. "The security standards and proper federal documentation requirements set out in this bill are imperative as the Registry begins the gradual process of implementation so credential holders may continue to board domestic flights and enter federal buildings in the coming years."

Governor Baker first filed REAL ID compliance legislation in October of 2015, with the Legislature ultimately adopting the Governor's bipartisan amendment to make explicit that both a REAL ID-compliant license and a Massachusetts license will only be issued to individuals with proof of lawful presence, ensuring undocumented immigrants do not obtain either type of license under the new system. The REAL ID Act, the result of work by the 9/11 Commission, sets minimum standards that states must meet during the issuance and manufacture of driver's licenses and Massachusetts resident identification cards. Only a REAL ID carries certain benefits such as serving as a valid form of identification to enter federal facilities and, once enforcement begins, the ability to board domestic flights.

"A driver's license is one of the most important forms of identification in our society, and it must have accuracy and integrity. That's why it's imperative that our state comply with the REAL ID Act as soon as possible, and without taking any chances that a license could be given to someone not legally in our state," **said Senate Minority Leader Bruce Tarr (R – Gloucester)**.

"The legislation Governor Baker has signed into law is an important clarification that eliminates any doubt as to who actually qualifies for a driver's license," **said House Minority Leader Bradley H. Jones, Jr. (R-North Reading)**. "By explicitly prohibiting the issuance of a driver's license to individuals who do not have lawful presence in the United States, we are not only upholding the security and integrity of our licensing system, but also moving Massachusetts into full compliance with the federal Real ID Act."

Massachusetts credential holders currently are not subject to enforcement rules set by the Department of Homeland Security (DHS) because the Commonwealth has a valid compliance extension, as do approximately half of the states in the country. At least 23 other states are already issuing REAL ID compliant credentials.

# Chapter 2

## CRIMINAL PROCEDURE

The Fourth Amendment of the United States Constitution and Article 14 of the Massachusetts Declaration of Rights govern all police searches and seizures in Massachusetts.

### **Fourth Amendment of the United States Constitution**

The Fourth Amendment states “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.” Under the Fourth Amendment, the courts analysis on the reasonableness of the search will be based on the “totality of the circumstances.”

### **Article 14 of the Massachusetts Declaration of Rights**

Article 14 states, “every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.” The court’s analysis on the reasonableness of the search has two (2) aspects: (1) What is the legal standard under which the search will be justified (reasonable suspicion, probable cause, or some other standard) and (2) Is a search warrant required in all instances?

The *Fourth Amendment* and *Article 14* only prohibits against unreasonable searches and seizures. In determining whether a search was reasonable, the court considers the following: (a) was a search warrant required, (b) was the warrantless search permissible by law or by school rules, (c) was the search based upon probable cause or reasonable suspicion, (d) was the suspicion particularized to a particular person or particular place, and (e) did the particular suspicion dispense prior to the search?

### **Reasonable Suspicion & Probable Cause**

**Reasonable Suspicion:** Is based on specific and articulable facts upon which reasonable inferences can be drawn, that a person has committed, is committing, and is about to commit a crime, or is armed and dangerous. In ***Commonwealth v. Wren, 391 Mass. 705, 707 (1984)***, the court stated, “[a] hunch will not suffice.”

**Probable Cause:** Is based on the belief that it is “more likely than not” that the suspect has committed or is committing a specific crime as well as the belief that it is “more likely than

not" that evidence will be discovered at a particular location. ***Commonwealth v. Haas*, 373 Mass. 545 (1977).**

A police officer may establish either reasonable suspicion or probable cause by either their own personal observations or from information received from other sources, such as: victim, witness, informant, anonymous tip, student, faculty, etc. However, when information is received from a source other than personal observations, police must establish the source's "basis of knowledge" and the "veracity" of the information.

## ***I. Field Encounters and Detentions***

### **Threshold Inquiry/Field Encounter**

Police officers are free to talk to anyone and can reasonably detain an individual to dispel an officer's concerns.

Threshold inquiry does not automatically give police authority to conduct a frisk.

Police can use mobile data terminals (MDTs) to verify a person's license information as long as the checks are random

***Commonwealth v. Murdough***, 428 Mass. 760 (1999) Police can approach any parked vehicle to check on occupants without it turning into a seizure.

### **Stop & Seizure**

Threshold inquiry becomes a stop when an officer uses authority to detain a person who is not free to leave. Some examples of a seizure include taking a person's identification, using an authoritative tone, activating blue lights.

No length of time has been designated to how long police can detain a person.

***Commonwealth v. Stoute***, 422 Mass. 782, 789 (1996): "Not every encounter between a law enforcement official and a member of the public constitutes an intrusion of constitutional dimensions requiring justification." A person is seized by the police only when, in light of all of the attending circumstances, a reasonable person in that situation would not feel free to leave.

***Id.*** at 786.

***Commonwealth v. Lyles***, 453 Mass. 811 (2009): Threshold inquiry became a stop when police took Lyles' identification and lacked reasonable suspicion to believe a crime was committed. Lyles was walking alone on a sidewalk near a housing project in Boston.

***Commonwealth v. Pimentel***, 27 Mass. App. Ct. 557 (1989) Police need to show some sort of authority in tone that would make an average person feel they were not free to leave in order for a seizure to occur.

***Commonwealth v. Smigliano***, 427 Mass. 490, 492 (1998) (activation of blue lights initiated a constitutional seizure where police officer observed erratic driving and pulled up behind the vehicle to investigate whether the defendant was intoxicated)

## **Frisks**

Police may have reasonable suspicion that a crime has been committed but no reason to conduct a frisk. Reasonable suspicion can be derived from an officer's personal observations or information received via an informant or dispatch.

Exterior search of suspect and conducted to find weapons NOT to locate evidence.

Frisks allowed when = officer safety, person is under arrest, protective sweep of a house or vehicle.

Frisks are limited in scope.

Good Frisk: ***Commonwealth v. Torres***, 433 Mass. 669, (2001): The Court held that the police officer was conducted a proper pat-frisk after there was a concern for safety during a routine traffic stop. The officer felt a hard object by the defendant's waistband, and then lifted his shirt to investigate further. It was then that he discovered that the object was a gun. This sequence comports with an appropriate pat-frisk. See ***Commonwealth v. Silva***, 318 N.E.2d 895 (1974).

Bad Frisk: ***Commonwealth v. Narcisse***. 454 Mass (2010): The SJC held that police cannot conduct a pat-frisk of person without reasonable suspicion.

***Commonwealth v. Gomes***, 453 Mass. 506 (2009). Although the stop of the defendant was justified by specific and articulable facts supporting an officer's belief that the defendant was engaged in drug activity, the circumstances did not warrant the patfrisk of the defendant, as the police lacked particular facts from which a reasonable inference could be drawn that the defendant was armed and presented a danger to the police or others. **NOTE:** In the dissent attached to this case, ***Commonwealth v. Rodriguez***, 415 Mass. 447 (1993), is mentioned and states that "while drug involvement certainly may be a relevant factor in assessment of threats to police safety, we are reluctant to adopt a blanket rule that all persons suspected of drug activity are to be presumed armed and dangerous for constitutional purposes."

***Commonwealth v. Flemming***, 76 Mass. App. Ct. 632, 638 (2010): The SJC that the defendant's cooperation and non-threatening movements, failed to justify the police's decision "to lift the defendant's shirt without conducting a pat-frisk first."



## **Revisiting Field Encounters Involving a Firearm**

***The Court held that police had reasonable suspicion to conduct an investigatory stop even though eyewitness descriptions did not match the defendant!***

***Commonwealth v. Johnson***, 88 Mass. App. Ct., 705 (2015): Lynn Police received a number of 911 calls relaying that there were “shots fired” on Harwood Street. One witness described the shooter as “being a black male, wearing a black jacket and a red bandana,” and running toward “Western Avenue.” Within minutes of receiving this information from dispatch Officer James McIntyre who was in the area responded that he had a “party with a gun near 170 Commons Street.” Officer McIntyre approached the Lynn Commons, which is “a long narrow park area that extends ten blocks, and has numerous trees at the end of the park.” There were two females and a male identified as Gabriel Smith inside the Commons. Officer McIntyre ordered Smith to place his hands on top of his head and Smith responded by screaming. At a later point, Smith was arrested for disorderly conduct.

During his encounter with Smith, Officer McIntyre saw “the silhouette of a person walking away from him near the tree area of the Commons, within twenty-five feet of where he was standing.” Officer McIntyre used his flashlight to observe the individual who was a “black male, with a gray hoodie pulled tightly around his face.” The man had his hands around his sides and Officer McIntyre ordered him to place his hands on top of his head twice before the man complied. Officer McIntyre approached the man, who was identified as Cajou Johnson. Officer McIntyre conducted a pat-frisk of Johnson and “felt an object he believed to be a handgun in his left front pocket.” Using an “arm bar,” Officer McIntyre was able to control Johnson while he retrieved a gun from him. Johnson was not wearing a black jacket nor did he have a red bandana as was initially reported. The entire encounter with Johnson occurred three and half minutes after the first dispatch.

Police charged Johnson and he filed a motion to suppress arguing that Officer McIntyre lacked reasonable suspicion to stop him. During the motion, there was no dispute as to the timing of when Johnson was stopped or whether the pat-frisk was reasonable. Additionally, the motion judge never considered the fact that Johnson was found in a closed park and therefore was committing a criminal trespass. Rather the motion judge focused on the proximity to the shots being fired in a residential area and the time span of when Johnson was found.

The last issue the judge addressed focused on the clothing Johnson was wearing along with his physical description. According to the motion judge, even though Johnson was not wearing a black jacket and did not have a red bandana, the missing clothing does not negate nor prevent articulable suspicion from being present. Outer clothing such as a jacket and bandana are easily discarded and probably not uncommon when a person is fleeing “a shots fired incident.” The motion was denied and Johnson was convicted of carrying a firearm without a license as a second offense and carrying a loaded firearm. Johnson appealed his conviction and the Court had to consider whether the motion judge erred when he found that Officer McIntyre had reasonable suspicion to believe Johnson was involved in the shootings at the time of the stop.

**Conclusion:** The Court affirmed Johnson's convictions and upheld the denial of the motion to suppress.

**1<sup>st</sup> Issue: Did Officer McIntyre have reasonable suspicion to stop Johnson?**

The Court concluded that Officer McIntyre had reasonable suspicion to warrant an investigatory stop of Johnson. Some of the factors the Court considered were the span of time that had elapsed from the initial dispatch to when Officer McIntyre located Johnson. Officer McIntyre observed Johnson less than three and half minutes after receiving multiple reports of shots fired on Harwood Street. Additionally, Johnson's actions of hiding among the trees in a closed public park after dark and wearing a hoodie tightly drawn around his face suggest he was avoiding police.

Another factor the Court considered involved the proximity of where Officer McIntyre encountered Johnson. A report indicated that the shooter fled toward Western Avenue. When Officer McIntyre found Johnson, he located in the opposite direction of Western Avenue.

The reliability of the 911 callers was not challenged but the "particularity of the callers' descriptions was challenged." The rule is the physical description need not be so limiting that it can only match one person, but it cannot be so general that it would encompass a large number of people who are in the area. The description of one caller identified the shooter as black while another indicated the shooter was Spanish. Both 911 callers failed to provide a particularized description that would establish reasonable suspicion. One caller stated that one of the shooters was wearing a black jacket and a red bandana. Johnson was not wearing a black jacket and he did not have a red bandana. Even Officer McIntyre testified during the motion that "nothing connected Johnson to the shooting other than being a black or Hispanic male."

Despite the lack of a particularized description, in the aftermath of a shooting, even if there is no particularized description of a suspect, the police may stop someone when circumstances make the seizure reasonable under the 4<sup>th</sup> Amendment or Article 14. See ***Commonwealth v. Depina***, 456 Mass at 247; (where gravity of the crime and the present danger of the circumstances may be considered reasonable suspicion.). In the underlying case, "physical proximity, closeness in time, Johnson's efforts to conceal and the danger to public safety supplemented the less distinctive physical description relayed in the police dispatch," and established reasonable suspicion when looked at together. The Court affirmed the denial of Johnson's motion to suppress and concluded that "taking these elements together, at the time of the Terry stop (See ***Terry v. Ohio***, 392 U.S. 1 (1968)), Officer McIntyre had a reasonable suspicion that Johnson had been involved in the shooting."

- ❖ **TRAINING TIP:** Last year, the SJC rule in ***Commonwealth v. Jones-Pannell***, 472 Mass 429 (2015), that the police lacked reasonable suspicion to seize the defendant because there was no indication he was involved in a crime or about to commit a crime. Unlike ***Jones- Pannell*** the police in ***Johnson*** were responding to a dispatch involving shots fired in a residential area. Although Johnson did not match the particularized description that eyewitness callers had provided, the Court found that there were other factors that justified stopping Johnson.

***Commonwealth v. Jones-Pannell***, 472 Mass 429 (2015): The SJC concluded that the police lacked reasonable suspicion to seize the defendant. The SJC did not find facts anew, as the Commonwealth had asked, but rather relied upon the facts found by the motion judge and contained in the record. The first portion of the SJC's decision discusses why the SJC did not find new facts on appeal while the second part of the decision focused on the key factors that the SJC considers are important for police.

### **Factors Important for Police:**

Moment when the defendant was seized: "A person is seized by the police when a reasonable person would not feel free to leave." See ***Commonwealth v DePeiza***, 449 mass. 367 (2007). Here the judge concluded that when the officer yelled, "**Wait a minute!**" and began chasing the defendant, the defendant was seized. While there was some issue, as to whether the defendant walked or jogged away, the SJC found that the point when the officer told the defendant to wait and chased him, a seizure occurred.

"The defendant was free to reject the police officer's multiple requests to speak with him, just as he was free to respond to the requests by increasing his pace." Unlike the situations in ***Commonwealth v. Powell***, 459 Mass. 572, 578 (2011) (where it was determined that there was no seizure when the flight was not prompted by police commands), the judge in this case found that the facts support the conclusion that the defendant's eventual running was prompted by the officers' actions. The officer's loud command to "wait," and his pursuit, had compulsory aspects that his prior requests did not. The evidence amply demonstrated that the defendant was not free to leave at that point. ***Id.***

Suspicion of criminal activity: At the time, the police seized the defendant, the following facts were established. The defendant had given "flight from police officers and keeping his right hand in his pants between his waist and his crotch." Second, it was after midnight when police encountered the defendant. Despite these facts, the area the police stopped the defendant was not a high crime area and the police did not know the defendant. Additionally, there were no reports or radio calls of a crime having been recently committed in the area and; the officers were on routine patrol." The absence of these factors suggested that police lacked reasonable suspicion to stop the defendant.

High Crime Area: The Commonwealth argued that the neighborhood could be characterized as a "high crime" area and that would add to the officers' suspicions. Although a characterization that an area is one of "high crime" may be relevant in determining whether a police officer's suspicion is reasonable, the accuracy of the characterization in a particular case depends on specific facts found by the judge that underlie such a determination, rather than on any label that is applied. See ***Commonwealth v. Johnson***, 454 Mass. 159, 163 (2009).

The SJC "cautioned that whether a neighborhood is a high crime area is a consideration that must be applied with care." "The term high crime area is itself a general term that should not be used to justify a stop or a frisk, without requiring the articulation of specific facts demonstrating the reasonableness of the intrusion. " See ***Commonwealth v. Gomes***, 453 Mass. 506, 513, (2009)." The judge's finding that the stop here did not take place in a "high crime" area was not clearly erroneous. Locations where firearms offenses are common, or where rival gang activity occurs, have been considered "high crime areas." See, e.g.,

***Commonwealth v. Pagan***, 63 Mass. App. Ct. 780, 781-783 (2005). Isolated incidents of nearby gun activity or the mere presence of gangs in the vicinity does not require a finding that a particular street is a "high crime area." Here there was no evidence regarding arrests in the area, no information that a crime had occurred, or that police were on patrol for a specific criminal activity occurring there. One officer stated that he had heard of "shots fired" about two weeks prior, and that there had been a shooting and recovery of a gun within the preceding months. There was no testimony that the area was inundated with gang activity or violence involving firearms. Based on the testimony and the facts in the record, the judge concluded that the location was not a high crime area.

Officer's training and experience: Although the record credited the officer's testimony that he had completed an eight-hour training class titled "Characteristics of Armed Gunmen." The judge did not find that "the training by itself or in combination with other factors made the officer's suspicion objectively reasonable." Additionally, there were no detailed findings about the content of the course contained in the record or testimony regarding the officer's training.

### **Characteristics Signaling that a Person may be Carrying a Firearm**

***Courts are emphasizing that police training and experience are critical factors when crediting whether suspect may be concealing a firearm.***

***Commonwealth v. Gabriel Colon***, 87 Mass. App. Ct., 398 (2015): The Court affirmed the convictions and that the police were justified in stopping Colon based on all the factors on the following factors:

- Familiarity and past history with other men: Detective Delgado had arrested four of the men that Colon was with on past narcotics offenses and home invasion.
- Flight and nervous demeanor: Although Detective Delgado did not recognize Colon, he observed Colon appear to be nervous and walk away quickly when he ordered the men to disperse in front of Manny's Market.
- High Crime Area: As indicated before there were numerous shootings in the area including a shooting that killed a police officer within the past few months.
- Bulge in Colon's pants: Detective Delgado observed a bulge under Colon's shirt on his right hip, which, based on the detective's experience and training, was consistent with carrying a firearm. See ***Commonwealth v. King***, 389 Mass. 233, 243 (1983). Detective Delgado also saw the defendant adjust the bulge.
- Training and experience: "Detective Delgado had been a Holyoke police officer for ten years and he worked in the narcotics and vice unit of the Holyoke Police Department as well as the gang task force. Detective Delgado was familiar with firearms, having made firearms arrests approximately (40) forty to (50) fifty times. Many of those arrests involved illegal possession of firearms on the street.

***The SJC holds that police unlawfully seized a backpack from the defendant whom they were arresting and could have left with a third party.***

***Commonwealth v. Jared Abdallah***, 475 Mass. 47, (2016): On June 1, 2013, Raynham police responded to a hotel for a disturbance. While on route to the hotel, police learned from a dispatch that the defendant had an outstanding warrant for larceny of \$250 or less. When the police arrived at the hotel, they learned the defendant had refused to leave his hotel room at the time of check out. The police knocked on the defendant's door and told him to drop his cell phone because one of the officers recognized him from a prior stabbing offense. The defendant complied and was arrested. Officers noticed that the defendant was wearing a small cloth backpack, which they removed while handcuffing him. Police maintained possession of the backpack as they brought the defendant to the cruiser. The officers informed the defendant that he would be able to pick up his belongings, including clothing and personal items that had been left in the hotel room, at the hotel's front desk after he was released. The defendant asked the officers to secure a computer and a video game system that were in his room, and they did so. The officers also asked the defendant whether he had an automobile with him; and the defendant relayed that he had parked his grandmother's vehicle in the hotel parking lot. Police asked the front desk clerk whether they could leave the defendant's belongings there to be picked up later and the clerk agreed. While being booked, the police opened the defendant's bag and removed its contents, which included several rolls of cash amounting to over \$7,000, small plastic bags containing cocaine, and approximately 500 Percocet pills. The defendant was charged and filed an appeal.

During the motion hearing, it was established that the bag had no connection for the defendant's arrest. There was no probable cause connecting the bag to the defendant's arrest. Relying on ***Commonwealth v. Madera***, 402 Mass. 156 (1988), the judge concluded that there was no probable cause to search the bag as incident to the defendant's arrest on the outstanding warrant, and therefore the search of the bag that had been on the defendant's person when he was arrested was unlawful. The Commonwealth appealed and argued that that the search of the defendant's bag was a permissible inventory search that may be undertaken not only of an arrested defendant's person, but also of a defendant's clothing and articles he or she is carrying. According to the Commonwealth, the defendant's bag was "constructively part of his person" at the time of his arrest, and the fact that an arresting officer removed it from his person before placing the bag and the defendant in the police cruiser does not affect the validity of the inventory search,

**Conclusion:** The Court affirmed the allowance of the motion to suppress and noted that has never previously considered whether police officers are authorized to seize a bag worn by a suspect at the time of arrest and later search it pursuant to an inventory policy, where police lack probable cause to seize or search it, and no other exception to the warrant requirement applies.

**1<sup>st</sup> Issue: Was there a public safety issue that justified police seizing the bag?**

As part of its analysis, the Court first considered whether it was reasonable for the officers in this case to take possession or seize the defendant's bag and transport it to the police station. The SJC notes that this is fact driven but agrees with the defendant's argument that the police could have left his backpack in the custody of the hotel clerk who had agreed to the secure the rest of his possessions which included a video gaming system and computer

within the hotel room. The SJC found that the only reason for the police to seize the bag would have been because there is a concern for public safety. Here, the general public would not have been at risk since the hotel clerk would be the only person who had access to it.

**2<sup>nd</sup> Issue: Was it necessary to inventory the backpack when the defendant's other belongings were left with the hotel clerk?**

The SJC concluded that it was significant that the police left other items belonging to the defendant with the hotel clerk for safekeeping. The police also arranged for the defendant's vehicle to remain the parking lot until one of the defendant's relatives could pick it up. Because of these circumstances, the SJC concluded that it was unreasonable for the police to single out the defendant's bag to take to the police station. The fact that the defendant did not ask the police to leave his bag with the hotel clerk is not significant. Based on the totality of the circumstances, it was unreasonable to seize bag.

❖ **TRAINING TIP:** The SJC never addressed the defendant's argument that the inventory search was a pretext to conduct an investigatory search.

**Commonwealth v. White Jr.**, 469 Mass 96 (2014): The SJC concluded that the inventory policy of the Cambridge Police Department allowed the officers to search the **"One Touch"** container because it provides that "any container or article found on the arrestee's person will be opened and its contents inventoried." See **Commonwealth v. Vuthy Seng**, 436 Mass. 537, 550, cert. denied, 537 U.S. 942 (2002) ("It is clear that, before a person is placed in a cell, the police, without a warrant, but pursuant to standard written procedures, may inventory and retain in custody all items on the person, including even those within a container"); **Commonwealth v. Bishop**, 402 Mass. 449, 451 (1988) (inventory search lawful under art. 14 of Massachusetts Declaration of Rights where conducted pursuant to standard, written police procedures).

Inventory searches "are justified to safeguard the defendant's property, protect the police against later claims of theft or lost property, and keep weapons and contraband from the prison population." **Vuthy Seng**, supra at 550-551. "Such inventory searches are intended to be 'non-investigatory.'" **Commonwealth v. Alvarado**, 420 Mass. 542, 553 (1995). One of the officers who was not the booking officer examined the seized pills from the container solely for an investigative rather than an inventory purpose by using the number imprinted on the pills to identify them on an Internet Web site. The investigative use of these pills transformed a lawful inventory seizure of the pills into an unlawful investigatory search of the pills. The SJC emphasized that "police may not hunt for information by sifting and reading materials taken from an arrestee which do not so declare themselves" **Commonwealth v. Sullo**, 26 Mass. App. Ct. 766, 770 (1989). The pills recovered from the **"One Touch"** container should have been suppressed even though the container was lawfully seized pursuant to the inventory policy. Once the officer commenced an investigation via an Internet search, a search warrant was required.

## **II. Search and Seizure**

### **Warrantless Searches**

**Commonwealth v. McKoy** 83 Mass. App. Ct. 309, (2013): The Court held that police officers had reasonable suspicion to conduct investigative stop of defendant and his companion, after receiving a report that a person had been shot at a house 100 yards from where defendant and companion were walking; defendant and companion were only people on the street due to poor weather conditions and were walking from direction of house where shooting had been reported, defendant dropped a large item to the ground when asked to remove his hands from his pockets, and companion kept his hand in his pocket prior to fleeing from officers. The "totality of the circumstances" and good report writing were key factors in this decision.

**Commonwealth v. Lyles**, 453 Mass. 811 (2009): The Court held that police acted on a hunch because they lacked reasonable suspicion. In **Lyles**, police officers stopped the defendant after they observed the defendant walking on a public sidewalk in an area known for drug activity. Since the officers did not recognize the defendant, they asked for his identification and checked for warrants. As soon as the police took the defendant's identification, a seizure occurred because he was not free to leave until the officers returned his identification and completed their investigation. The defendant in **Lyles** did not voluntarily provide his identification but only turned it over after the police asked for it.

**Commonwealth v. Fraser**, 410 Mass. 541, 544 (1991): The Court held it was reasonable for officer to ask the man to remove his hands from his pockets because the officer had concern for his safety.

### **Updates on Recent Drug Cases**

**Commonwealth v. Bradley St. George**, 89 Mass. App. Ct. 764 (2016): In May 2010, Quincy police Drug Control Unit, observed, a man identified as Robert Fitzmorris, standing in front of an apartment building. Fitzmorris was talking on his cell phone and appeared to be waiting for someone. A short time later, police observed the defendant, Bradley St. George, pick up Fitzmorris in his vehicle. The defendant drove into a school parking lot School and stopped next to a gray Mitsubishi automobile. Fitzmorris entered the , Mitsubishi with a brown paper bag in his hand, while the defendant drove away. Quincy police stopped Fitzmorris in the parking lot even though he attempted to flee and "speed" out of the parking lot. When police finally apprehended Fitzmorris, he admitted that he purchased "only weed." Police seized approximately one pound of marijuana.

Police stopped the defendant, Bradley St. George, at a traffic light after they observed a large sum of money in his right hand and the defendant nervously looking around. Police had to take the defendant's keys after he failed to comply with their order's to shut off the vehicle. The defendant was arrested and charged with distribution of a class D substance, see G. L. c. 94C, § 32C, and violating the drug laws near a school zone or park, see G. L. c. 94C, § 32J. While police were conducting an inventory search of the defendant's vehicle, they found \$700 in the center console and \$110 in the defendant's wallet (in addition to the \$1,000 found in his hand when he was stopped). The police also found "cuff sheets" showing names and money owed, and a bank receipt showing the defendant had a bank balance of \$74,000. The

defendant appealed his conviction and argued that the police lacked sufficient justification to stop him and the stop exceeded the scope of a threshold inquiry.

**Conclusion:** The Appeals Court affirmed the denial of the defendant's motion to suppress on two grounds:

1. The police had reasonable suspicion to stop the defendant.
2. The exit order was lawful based on the circumstances.

**1<sup>st</sup> Issue: Did police have reasonable suspicion to stop the defendant?**

The Court determined that police had sufficient articulable facts and reasonable suspicion to justify that a crime had been committed. The Appeals Court considered a number of factors in reaching this conclusion.

- Fitzmorris was observed without a bag and making a telephone call, waiting for the defendant to pick him up, and taking a short and suspicious drive around the block with the defendant, ending up at Fitzmorris's car about one hundred yards away from where he was picked up;
- Fitzmorris left the defendant's car with a bag;
- Fitzmorris fled the scene when police approached displaying his badge
- Area was considered high crime

**2<sup>nd</sup> Issue: Was the exit order sufficient?**

The Court determined that the police were justified in ordering the defendant out of the vehicle and handcuffing him prior to his arrest. "The officers were permitted to take reasonable measures, which included ordering the defendant out of the vehicle in which he was sitting, to ensure that he did not attempt to escape before they could conduct a threshold inquiry." **Commonwealth v. Bostock**, 450 Mass. 616, 622 (2008). Based on the circumstances, it was reasonable for the police to order the defendant out of his vehicle and to handcuff him to prevent him from fleeing. The defendant had failed to respond to the repeated commands to turn off the engine and looked in all directions suspiciously. See **Commonwealth v. Blake**, 23 Mass. App. Ct. 456, 460 (1987) Additionally, the Court concluded that it is permissible for police to act on a probability that the occupants of the car, conscious of guilt and fearing imminent exposure, would, unless blocked [or otherwise temporarily immobilized], attempt flight, with danger to the public, the police racing in pursuit, and the occupants themselves"). Accordingly, the investigatory stop, as well as the subsequent actions of the detective incident to the stop, were permissible and the motion judge did not err in denying the defendant's motion to suppress. See **Commonwealth v. Knight**, 75 Mass. App. Ct. 735, 739 (2009) ("Contrary to the defendant's claim, his arrest was not complete at the point when he was ordered out of the car or even when he was handcuffed").



***The Court holds that a child care facility will qualify as a "preschool" under the school zone statute if the facility enrolls children younger than school age!***

***Commonwealth v. Miguel Cruz***, Mass. App. Ct. No. 11-P-1160 (2016): The issue the Appeals Court considered was whether a child care facility that enrolls younger than school aged children can qualify as a "preschool" within the meaning of the school zone statute.

In 2007, the defendant, Miguel Cruz, sold cocaine to a police officer working undercover. The transactions took place, across from the East Boston YMCA which operates health center, teen programs, and the East Boston Child Care Center (center). The child care center is a licensed child care facility and is accredited by the National Association for the Education of Young Children. The defendant was convicted and appealed arguing that the school zone statute does not define "preschool" and therefore the YMCA child care center falls outside of the school zone definition.

**Conclusion:** The Court affirms the convictions and concludes that "preschool" does fall within the intent of the school zone statute based on the Court's interpretation of other sources of law. Below is a copy of the school zone statute which states:

**"Any person who violates the provisions of [G. L. c. 94C, §§ 32A or 32E,] while in or on, or within one thousand feet of the real property comprising a public or private accredited preschool, accredited headstart facility, elementary, vocational, or secondary school whether or not in session, or within one hundred feet of a public park or playground shall be punished" (emphasis supplied).**

Since the statute does not define, "preschool," the Court examined other statutes that do define the term. The term "preschool" appears in **G. L. c. 15D, § 1A**, among the types of institutions that may constitute a "child care center," for purposes of the department of early education and care. Based on these sources, the Court understands and accepts the meaning of "preschool" to be a facility where children of younger than elementary school age receive educational instruction. Moreover, the Court's interpretation comports with the broad purpose of the school zone statute, which was enacted to "make every school and surrounding community safe from the destructive impact of drug trafficking and drug abuse." ***Commonwealth v. Roucoulet***, 413 Mass. 647, 651 (1992). Although the Court has not defined the term "preschool," in prior decisions, it did hold in an unpublished opinion that a preschool to be a "kindergarten or nursery school for children of preschool age." See ***Commonwealth v. Rivera***, 70 Mass. App. Ct.1106 (2007).

### ***Marijuana Remains a Schedule 1 Controlled Substance***

#### **DEA Announces Actions Related to Marijuana and Industrial Hemp**

**AUG 11 (WASHINGTON)** - The Drug Enforcement Administration (DEA) announced several marijuana- related actions, including actions regarding scientific research and scheduling of marijuana, as well as principles on the cultivation of industrial hemp under the Agricultural Act of 2014.

**DEA Publishes Responses to Two Pending Petitions to Reschedule Marijuana**

DEA has denied two petitions to reschedule marijuana under the Controlled Substances Act (CSA). In response to the petitions, DEA requested a scientific and medical evaluation and scheduling recommendation from the Department of Health and Human Services (HHS), which was conducted by the U.S. Food and Drug Administration (FDA) in consultation with the National Institute on Drug Abuse (NIDA). Based on the legal standards in the CSA, marijuana remains a schedule I controlled substance because it does not meet the criteria for currently accepted medical use in treatment in the United States, there is a lack of accepted safety for its use under medical supervision, and it has a high potential for abuse.

In his [letter](#) to the petitioners, DEA Acting Administrator Chuck Rosenberg offered a detailed response outlining the factual and legal basis for the denial of the petitions.

The full responses to the petitions can be found in the Federal Register. [Response 1](#) AND [Response 2](#)

The DEA and the FDA continue to believe that scientifically valid and well-controlled clinical trials conducted under investigational new drug (IND) applications are the most appropriate way to conduct research on the medicinal uses of marijuana. Furthermore, DEA and FDA believe that the drug approval process is the most appropriate way to assess whether a product derived from marijuana or its constituents is safe and effective and has an accepted medical use. This pathway allows the FDA the important ability to determine whether a product meets the FDA criteria for safety and effectiveness for approval.

### **Increasing the Number of Authorized Marijuana Manufacturers Supplying Researchers**

DEA announced a policy change designed to foster research by expanding the number of DEA-registered marijuana manufacturers. This change should provide researchers with a more varied and robust supply of marijuana. At present, there is only one entity authorized to produce marijuana to supply researchers in the United States: the University of Mississippi, operating under a contract with NIDA. Consistent with the CSA and U.S. treaty obligations, DEA's new [policy](#) will allow additional entities to apply to become registered with DEA so that they may grow and distribute marijuana for FDA-authorized research purposes.

This change illustrates DEA's commitment to working together with the FDA and NIDA to facilitate research concerning marijuana and its components. DEA currently has 350 individuals registered to conduct research on marijuana and its components. Notably, DEA has approved every application for registration submitted by researchers seeking to use NIDA-supplied marijuana to conduct research that HHS determined to be scientifically meritorious.

### **Statement of Principles Concerning Industrial Hemp and the Agricultural Act of 2014**

The U.S. Department of Agriculture (USDA), in consultation with DEA and the FDA, also released a statement of principles concerning provisions of the Agricultural Act of 2014 relating to the cultivation of industrial hemp. Industrial hemp is a low-concentration THC variety of the cannabis plant intended to be used for industrial purposes (e.g., fiber and seed). This statement of principles is intended to inform the public, including institutions of higher education and State departments of agriculture, how Federal law applies to activities associated with industrial hemp that is grown and cultivated in accordance with Section 7606 of the Agricultural Act of 2014.

This statement of principles outlines the legalized growing and cultivating of industrial hemp for research purposes under certain conditions, such as in states where growth and cultivation are legal under state law. The 2014 Act did not remove industrial hemp from the list of controlled substances and, with certain limited exceptions, the requirements of the Federal Food, Drug, and Cosmetic Act and

the CSA continue to apply to industrial hemp-related activities. The statement of principles addresses questions including the extent to which private parties may grow industrial hemp as part of an agricultural pilot program, the circumstances under which the sale of hemp products is permitted, and other related topics.

### **Exigent Circumstances**

#### ***Destruction of evidence along with flight of suspects is sufficient to justify the warrantless entry into a home under exigent circumstances!***

**Commonwealth v. Ramos**, 470 Mass. 740 (2015): In April 2007, Derek Lam contacted police to notify them that this Honda Civic was stolen from his fiancée's house in Natick. Lam asked police to activate his LoJack transmitter. The LoJack signal pinged from a detached garage behind a house located in Lynn. Officer Robert Avery of Lynn Police, was on patrol in the area of the garage, and "he could noises, like metal tools being used, coming from behind one of the garage doors," as he exited his cruiser. One of the overhead garage doors was lifted three inches. Before approaching the garage, Officer Avery had learned that the address was under investigation for possibly running a chop shop. Officer Avery looked over the fence and saw three men running out of a regular door at the back of the garage, into the yard, and toward the house. However when Officer Avery ran around to the driveway side of the house, he saw only two men. Another officer arrived to assist Officer Avery and they placed two men in custody that were found in the yard. As Officer Avery could see inside the garage as he walked through the yard and he observed a Honda Civic; that matched the vehicle that had been reported stolen. Later, he confirmed that that the VIN of the vehicle matched the VIN of the stolen vehicle the officers had been tracking. Police learned from a neighbor that another man may be hiding inside the house. After police secured a warrant for the property, they arrested the defendant, Alex Ramos who hiding inside the house. The defendant was indicted on a charge of receiving a stolen motor vehicle, G.L. c. 266, § 28; a codefendant was indicted on charges of receiving a stolen motor vehicle and of receiving stolen property with a value exceeding \$250.

The defendant filed a motion arguing that there was no exigency and therefore the police's warrantless entry into the garage was unlawful. The motion was denied and the judge concluded that the warrantless search of the defendant's garage was permissible due to exigent circumstances, and that the search was permissible under what he termed an "accomplice sweep" exception to the warrant requirement, a concept that has not been adopted in the Commonwealth

**Conclusion:** The Court affirmed the denial of the motion to suppress and found that the police entry into the garage was justified based on exigent circumstances.

#### **1<sup>st</sup> Issue: Were the police justified for a warrantless entry under exigent circumstances?**

The SJC determined that the potential destruction of evidence was an exigency that justified the police officer's warrantless entry into the garage. Two conditions must be met in order for a nonconsensual entry to be valid: (1) there must be probable cause and (2) there must be exigent circumstances" **Commonwealth v. DeJesus**, 439 Mass. 616 , 619 (2003).

There was no dispute that the police had probable cause based on the information received from the LoJack signal. The primary issue focuses on whether there was an exigency when the police heard a vehicle being dismantled inside the garage.

"Exigencies which may justify a procedure without warrant are a narrow category and must be established by the Commonwealth which bears the burden of proof." **Commonwealth v. Young**, 382 Mass. 448, 456 (1981). Among the exigencies providing justification for a warrantless entry into a home is an officer's reasonable belief that the entry is necessary to prevent "the potential loss or destruction of evidence." **Commonwealth v. DeJesus**, 439 Mass. 616 , 619 (2003).

Here, two officers used LoJack receivers to identify the garage as the probable location of the stolen vehicle. When police arrived, that had learned that the garage was suspected of being a "chop shop" where stolen vehicles would be dismantled and their VIN numbers destroyed. As Officer Avery approached the garage, he heard the sounds of ratchets and wrenches from inside the garage. After Officer Avery knocked and announced his presence, he heard the sound of tools being dropped and people yelling. The officers did not know how many people were inside the garage. Before searching the garage, they had learned that the defendant, who lived at that address and who had been involved in previous motor vehicle thefts, was not among the men apprehended in the yard. One of the men who had been apprehended initially had attempted to conceal himself from police and was found hiding under a pile of trash bags. The rapidly unfolding events occurred at a point when only three officers were on the scene, although others continued to arrive. Based on these circumstances, it would have been objectively reasonable for an officer to believe that he needed to enter the garage and conduct a limited search in order to prevent further destruction of the vehicle, or the removal of the stolen vehicle's parts, license plate, or VIN number, by any individual who might have remained in the garage. **Commonwealth v. Grundy**, 859 A.2d 485, 488-489 (Pa.Super.Ct.2004) (probable cause and exigent circumstances existed where police officers followed LoJack signal to garage suspected of being "chop shop" and, upon arrival, heard sound of power saw). "If the police had taken the time to first seek a warrant," they reasonably could have believed that "the [vehicle] would have been in parts and junk by the time they got back . [because] a car can be disassembled in a matter of minutes."

Additionally, the defendant, who lived at the address and previously had pleaded guilty to charges of stealing a motor vehicle, was not among the two men who had been apprehended in his yard, and because officers had reason to believe that he might still be in the garage destroying evidence, entry into the house was justified. Furthermore, the garage doors faced away from the yard and the house and onto the street, the defendant had a route of escape if he was not apprehended. The warrantless entry into the garage was justified by reason of exigency.

## **2<sup>nd</sup> Issue: Was the evidence to prove that the defendant had possession of the stolen vehicle as required under the statute?**

The three elements necessary to prove the offenses of receiving a stolen motor vehicle are listed below:

- (1) the motor vehicle was stolen;

(2) the defendant received the motor vehicle; and

(3) the defendant knew that the motor vehicle was stolen. See G.L. c. 266, § 28 (a). "

Receiving stolen property means acquiring **possession**" or control of it. See **Commonwealth v. Aponte**, 71 Mass.App.Ct. 758, 760 (2008). "[P]ossession need not be exclusive. It may be joint and constructive, and it may be proven by circumstantial evidence." **Commonwealth v. Brown**, 50 Mass.App.Ct. 253, 257 (2000). "Actual and constructive possession, however, require 'knowledge plus ability and intention to control. See **Commonwealth v. Fernandez**, 48 Mass.App.Ct. 530, 532 (2000).

The defendant compares the facts of this case to **Commonwealth v. Campbell**, 60 Mass.App.Ct. 215, 217 (2003), and he argues that his mere presence in the vicinity of the stolen vehicle was not sufficient to establish that he possessed it, given the absence of evidence indicating how and for how long he had been associated with the vehicle. The SJC did not agree and found that the circumstances in this case are very different from **Campbell**. Here, beyond mere presence in the vicinity of the vehicle, there was substantial additional evidence from which a jury could conclude that the defendant had possession of the stolen vehicle. The SJC found there was sufficient evidence to prove the defendant received a stolen motor vehicle.

### **Emergency Aid Exception**

**Commonwealth v. David Kaeppler**, 473 Mass.396 (2015): The SJC held that the police had objectively reasonable grounds to believe that the defendant may have been injured or in need of immediate medical assistance, but the seizure of evidence was unreasonable for two reasons: (1) the police seized the evidence after the defendant left his house and they had no consent and (2) police retained the evidence.

The defendant, David Kaeppler met the victim and some of his friends at a nightclub in Hyannis. The defendant invited the victim and his friends to his house in Barnstable where he gave everyone shots of tequila. The victim and a female friend stayed over at the defendant's house while the others left. At one point in the night, the victim awoke to the defendant performing oral sex without his consent. The next morning the victim's friends returned to the defendant's house and could not wake the victim's female friend. Shortly afterwards, the victim became ill. The victim and his female friend were brought to the hospital where the staff determined that both had gamma-hydroxy butyric acid (GHB) in their systems. Hospital staff contracted police to perform a well-being check on the defendant and make sure he did not have GHB related illness since he had not shown up for work. The police arrived and encouraged the defendant to go the hospital after he said he did not feel well. After the defendant left in an ambulance, police seized two bottles of tequila from the defendant's home. The bottles of tequila were not tested until months later. The defendant was charged and later convicted of rape, drugging for sexual intercourse and drugging to confine. The defendant appealed his conviction and argued that police had unlawfully seized the tequila bottles from his home during a warrantless search.

**Conclusion:** The SJC considered two issues on appeal. The first issue focused on whether the police were justified entering the defendant's home without a warrant under the emergency exception. The second issue analyzed whether the seizure of the bottle was lawful under this exception.

The SJC held that the police were justified entering the home without a warrant after they received information from hospital staff that two individuals the defendant had been with the evening before had become seriously ill. The request from hospital staff together with a report from a coworker that the defendant had not appeared at work that day established urgency regarding the defendant's safety and presented an emergency warranting police intervention for that purpose. See **Commonwealth v. Snell**, 428 Mass. 766 (1999). The police's actions after entering the defendant's home were focused solely on the defendant's well-being to ensure he did not need medical attention.

Once the police sent the defendant to the hospital, the emergency ended. Because the emergency was over, the SJC found that the police officer's actions were unreasonable when they seized the tequila bottles from the defendant's home. "Reasonableness, in turn, is informed by the well-settled rule that a warrantless search must be strictly circumscribed by the exigencies which justify its initiation." **Terry v. Ohio**, 392 U. S. 1 (1968). Furthermore, since "no one from the hospital staff had requested that the bottles be seized and they were not tested for four months," the SJC determined that the seizure of the tequila bottles was unconstitutional and reversed the defendant's convictions.

### **Community Caretaker Exception**

The community caretaking function "applies when the purpose of the police [intrusion] is not to gather evidence of criminal activity but rather, because of an emergency, to respond to an immediate need for assistance for the protection of life or property." **Commonwealth v. Bates**, 28 Mass. App. Ct. 217 , 219 & (1990).

- Community caretaker exception must be separated from "the detection, investigation or acquisition of evidence relating to a criminal statute." See **Cady v. Dombrowski**, 413 U.S. 433 (1973):

#### ***Checking on drivers in a rest area justified under community caretaker exception.***

**Commonwealth v. Murdough**, 428 Mass 700 (1999): The Court held that the police were justified in checking on a driver who was parked in a rest area with his brake lights on. After two minutes of knocking on the window, the police were able to awake the driver who fell asleep and was incoherent. The police ordered the driver out of the vehicle and observed drugs in plain view. The exit order was significant but the Court found that the "community caretaker exception can extend to protecting others from danger by investigating the defendant's activity."

#### ***A broken down vehicle along a road also justifies the caretaker exception.***

**Commonwealth v. Evans**, 436 Mass. 369 (2006): A State trooper who observed a vehicle parked in the breakdown lane late at night, and with a directional light blinking, had sufficient justification, as part of his community caretaking responsibilities, to stop behind the

defendant's parked vehicle with his blue lights activated. The trooper's subsequent inquiry regarding the defendant's license and registration were reasonable. When the trooper learned the driver was operating a vehicle with a revoked license, he arrested the driver and subsequently discovered drugs on the driver during booking.

***Examples of Community Caretaker Exception does not apply***

***Commonwealth v. Lubiejewski* 49 Mass. App. Ct. 212, 729 N.E. 2d 288 (2000):** The Court found that the community caretaker exception did not apply in when a trooper arrested a motorist for operating under the influence and operating a motor vehicle negligently so as to endanger the public, even though the trooper never observed the motorist driving improperly. Rather the trooper arrested the motorist based on an anonymous report that he received indicating that a truck was driving on the wrong side of the highway.

***Commonwealth v. Quezada*, 67 Mass. App. Ct. 693 (2006):** The Court found that the police officer's order to stop exceeded the scope of the community caretaker exception. Even though the police observed the defendant to be impaired or possibly injured, he was being assisted by another person. When the defendant fled from police it indicated he was not in need of assistance and the action of the police in chasing him did not come within the community caretaking function.

**The 1<sup>st</sup> Circuit Court holds that a police officer's warrantless entry into a home was not justified under the community caretaking exception.**

***Scott Matalon v. Hynnes*, 806 f. 3d 627 (1<sup>st</sup> Cir. 2015):** Boston Police officers entered into a dwelling in the Brighton neighborhood of Boston looking for a suspect in an armed robbery. Since the officers were engaged in a criminal investigation, when they entered the dwelling, they lacked probable cause. In its analysis, the Court examines most of the case law concerning community caretaking functions typically involved actions by police officers with respect to motor vehicles. "The doctrine's applicability has been far less clear in cases involving searches of the home." See ***United States v. Rodriguez-Morales***, 929 F.2d 780 (1st Cir. 1991), like ***Cady v. Dombrowski***, 413 U.S. 433 (1973) and like our decision in ***United States v. Coccia***, 446 F.3d 233, 238 (1st Cir. 2006), excludes criminal investigation activities from the purview of the community caretaking exception. After all, we were careful to explain in ***Rodriguez-Morales*** that the community caretaking exception exists to provide a rubric for analyzing 'the wide range of responsibilities that police officers must discharge *aside from their criminal enforcement activities*.' 929 F.2d at 785 (emphasis supplied). This mapping of the boundaries of the community caretaking exception accords with the cartography of every other circuit that has addressed the question.

The officers charged with excessive force and violating the petitioner's 4<sup>th</sup> amendment rights argue that they should be entitled to qualified immunity because they entered the private residence without a warrant under the community caretaking exception. This exception was carved out by the Supreme Court in the ***Cady v. Dombrowski*** 413 U.S. 433 (1973). In ***Cady***, the Supreme Court examined a warrantless search of a car that had been towed following a traffic accident to secure a gun believed to be in the vehicle was reasonable and whether it violated the 4<sup>th</sup> Amendment. See ***Id.*** at 436-37.

The Supreme Court determined that the police were justified in searching the car under the "community caretaking functions." *Id.* at 441. Since **Cady**, the community caretaking exception has evolved into "a catchall for the wide range of responsibilities that police officers must discharge aside from their criminal enforcement activities." **United States v. Rodriguez-Morales**, 929 F.2d 780, 785 (1st Cir. 1991). The case law concerning community caretaking functions most often has involved actions by police officers with respect to motor vehicles. See, e.g., **Cady**, 413 U.S. at 441; **Rodriguez-Morales**, 929 F.2d at 785. The doctrine's applicability has been far less clear in cases involving searches of the home. See, e.g., **United States v. Tibolt**, 72 F.3d 965, 969 n.2 (1st Cir. 1995) (leaving this question open);

The community caretaking exception is distinguished from other exceptions to the Fourth Amendment's warrant requirement because it "requires a court to look at the *function* performed by a police officer" when the officer engages in a warrantless search or seizure. **Hunsberger v. Wood**, 570 F.3d 546, 554 (4th Cir. 2009). **Cady** defined community caretaking functions as being "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." 413 U.S. at 441. Cases that do not satisfy this requirement fall outside the heartland of the community caretaking exception, and it is not surprising that the courts that have addressed the exception have stressed the separation between the police's community caretaking functions and the normal work of criminal investigation. See, e.g., **Hunsberger**, 570 F.3d at 554

Here, the record establishes beyond hope of contradiction that the police officer was engaged in a quintessential criminal investigation activity — the pursuit of a fleeing felon in the immediate aftermath of a robbery — when she ordered the search of the plaintiff's home. At trial, the officer testified that she arrived at the plaintiff's residence after being directed there by a witness to the crime and that she believed the suspect had fled into the dwelling. Thus, her actions fall far beyond the borders of the community caretaking exception.

The facts in this case differ from **Rodriguez-Morales** where officers were engaged in an activity squarely within the heartland of the community caretaking function — removing a car from the highway when no occupant of the vehicle had a valid driver's license — rather than a criminal investigation. See *Id.* at 785.

The Court further stated that there are other exceptions to the warrant requirement including "exigent circumstances," which applies when "there is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant." **Fletcher v. Town of Clinton**, 196 F.3d 41. Relevant scenarios include "(1) 'hot pursuit' of a fleeing felon; (2) threatened destruction of evidence inside a residence before a warrant can be obtained; (3) a risk that the suspect may escape from the residence undetected; or (4) a threat, posed by a suspect, to the lives or safety of the public, the police officers, or to herself." **Hegarty v. Somerset County**, 53 F.3d 1367, 1374 (1st Cir. 1995). Relatedly, a subset of the exigent circumstances rubric covers "emergency aid." Within this subset, "the police, in an emergency situation, may enter a residence without a warrant if they reasonably believe that swift action is required to safeguard life or prevent serious harm." **Martins**, 413 F.3d at 147; see **Brigham City v. Stuart**, 547 U.S. 398, 403 (2006).



**Conclusion:** The Court held that in this case, the community caretaker exception did not apply because the officer was involved in an ongoing criminal investigation when she entered the private residence.

***Commonwealth v Colon***, 88 Mass. App. Ct. 579(2015):The Appeals Court found that police were not justified in conducting a protective sweep of the defendant's apartment since there was not threat to officer safety. As a result any evidence seized by police officers during a warrantless search of the defendant's apartment in the course of executing a warrant for the defendant's arrest on a charge of illegal possession of a firearm, must be suppressed. Here the defendant opened the door, said, "let's go," and attempted to leave with the officers. The only individual claimed to represent a threat was cooperating with the police, had submitted to custody and, from all appearances, was completely compliant. The police had achieved their objective without conflict and in fairly short order and therefore eliminated a need for police to enter the defendant's home.

### **Curtilage**

***Commonwealth v. Sanchez***, 88 Mass. App. Ct. 249 (2016): New Bedford Police officers executed a search warrant for a third floor apartment in a multifamily dwelling. Police stopped Luis Sanchez, the defendant and obtained a set of keys from him which gave them access to the apartment. The backyard behind the dwelling was enclosed by a fence and one of the officers used a key obtained from Sanchez to open a padlock that was securing a shed door. Once inside the shed, the officer found a BMW, a dirt bike, tools, and a shopping bag. The officer used the key to gain access to the BMW. While in the shed, the officer found cocaine hidden above a ceiling panel. The police also seized receipts from the defendant indicating he rented the shed from the owner of the apartment building. The Court considered whether a free standing shed in the backyard of a three apartment building would be included within the scope of a search warrant issued to search the defendant's third- floor apartment?

**Conclusion:** The Appeals Court concluded that curtilage included the shed and therefore it was lawful to search it as an extension of the search warrant. "Curtilage typically refers to the areas that the police cannot search without a warrant." ***United States v. Dunn***, 480 U.S. 294 (1987).

There are 4 factors that help define curtilage of a particular home.

- Proximity of the area to the home;
- Whether the area is included within an enclosure surrounding the home;
- The nature of the uses to which the area is put;
- The steps taken by the resident to protect the area from observations by people passing by.

The ***Dunn*** factors support the motion judge's finding that the shed is a part of the curtilage of the third-floor apartment. The shed is within the backyard, immediately adjacent to the building in which the apartment is located, and the yard itself is enclosed by a fence.

One of the most significant factors is that the defendant rented the shed from the building owner, and restricted access to it by means of the padlock he placed on the door. By placing a padlock on the door, the defendant had exclusive access to, and use of, the shed, at least in comparison to the occupants of the other two apartments in the building, or other members of the public. The Court holds that the shed was part of the curtilage of the defendant's apartment and that the warrant authorizing the search of the apartment also authorized search of the shed.

### **Consent Searches into Dwellings**

**United States v. Bey**, 52 F. Supp. 3d 299 (D. Mass, 2014): Police enter a third party's residence to serve an arrest warrant and they subsequently search back pack. The third party gave consent for police to enter and had common authority to consent to search. The defendant, Paul Bey, contends that the police 'engaged in coercive tactics' that overpowered his girlfriend, Clarissa Summons' will by implying that they needed consent and she agreed because the presence of law enforcement left her feeling forced to comply.

**Conclusion:** The Court held that the consent given by Bey's girlfriend was valid and that included allowing police to search a backpack that was found within the apartment.

#### **1<sup>st</sup> Issue: Did third party have authority to give consent and was it valid?**

The Court concluded that the consent given by Bey's girlfriend was valid. "The consenting party's possibly vulnerable subjective state is a factor in our balancing approach." In viewing the totality of the circumstances, the girlfriend's consent appeared voluntary. Furthermore, the facts indicate that three police officers appeared at the doorstep and inform the girlfriend that they had an arrest warrant for the defendant whom they believed to be inside. The police never place Bey's girlfriend in custody nor did they draw their weapons in an attempt to apply any pressure beyond appearing ready and eager to enter. There was no overt act or threat of force against the girlfriend nor were there 'promises made to her, nor are there any 'indications of more subtle forms of coercion that might flaw her judgment. Indeed, the officers did not even directly ask to be admitted before the girlfriend opened the door to the police and signaled that they should enter. The girlfriend's decision to allow the police to enter her home for the purpose of searching for Bey was knowing and intelligent.

#### **2<sup>nd</sup> Issue: Did the police have the authority to search the back pack?**

The Court concluded that when the girlfriend signed the consent form, she gave police authority to search of the black backpack found near Bey. There is no dispute that the girlfriend possessed common authority to consent to search based on her ownership and shared use of the apartment. Bey conceded in district court that his girlfriend possessed common authority to consent to a search based on her ownership and shared use of the backpack. As a result of the signed consent form and the girlfriend's common authority over the back pack, the government's search was legal, and the evidence found within it will not be suppressed.

### 3<sup>rd</sup> Issue: Did third party have authority to give consent and was it valid?

The third issue the Court considered focused on whether the girlfriend's consent was voluntary or coerced by police. Bey contends that his girlfriend's consent to the search the backpack was procured by the police officers' threat to call the state's child welfare agency and the invocation of the possibility that her young son would be removed from her home. "This re-creation of what occurred after Bey was arrested and removed from the girlfriend's home differs dramatically from the account provided by the police. Furthermore, the girlfriend was not in custody and the police did not have their guns drawn as they chatted with her. There was no indication that the police pressured the girlfriend to sign the consent form. After examining the totality of the circumstances, the Court held that the girlfriend's decision to admit the police into her home for the purpose of searching for Bey was knowing and intelligent and that she signed the consent forms on her own accord.

#### **Massachusetts cases regarding consent searches**

In Massachusetts, the Courts have addressed some of the complex issues surrounding consent in a few cases. The SJC found in ***Commonwealth v. Porter, P.*** 456 Mass. 254 (2010), that the shelter director did not have authority to allow police to search the juvenile's room because this was equivalent to a home for the juvenile and his mother. Although the shelter director had a master key and could enter the room "for professional business purposes" it did not diminish the legitimacy of juvenile's privacy interest in the room. The Massachusetts SJC declared that under *Article 14 of the Massachusetts Declaration of Rights*, a person may have actual authority to consent to a warrantless search of a home by the police only if:

(1) the person is a co-inhabitant with a shared right of access to the home, that is, the person lives in the home, either as a member of the family, a roommate, or a houseguest whose stay is of substantial duration and who is given full access to the home; or

(2) the person, generally a landlord, shows the police a written contract entitling that person to allow the police to enter the home to search for and seize contraband or evidence. No such entitlement may reasonably be presumed by custom or oral agreement." *Id.* at 264-265.

Furthermore, the SJC in ***Porter***, imposed two (2) additional requirements on police when consent to search is given under the common authority.

"First ... the police officer must base his conclusion of actual authority on facts, not assumptions or impressions. He must continue his inquiry until he has reliable information on which to base a finding of actual authority to consent ...

Second ... [p]olice must not only thoroughly question the individual consenting to the search with respect to his or her actual authority, but also pay close attention to whether the surrounding circumstances indicate that the consenting individual is truthful and accurate in asserting common authority over the premises." ***Id.*** at 271-272. ***Commonwealth v. Porter, P.*** 456 Mass. 254 (2010).

**Porter** clarified that a person must have actual or apparent authority over the premises in order to give consent for police to enter the home or residence. In addition to the owner of the property giving consent, a person who has common authority and mutual use over the property such as a co-tenant may also give police consent to search. However, a co-tenant's authority may be limited only to common areas to be searched. As noted in **Georgia v. Randolph**, 547 U.S. 103, 112 (2006), "when it comes to searching through bureau drawers, there will be instances in which even a person clearly belonging on the premises as an occupant may lack the perceived authority to consent." It is important to understand that that a co-tenant cannot give police consent to search over the objection of another co-tenant.

**Commonwealth v. Fernando Santos**, 465 Mass. 689 (2013): Police were dispatched to a house for a potential rape of a child. When police arrived, the mother of the victim directed police into the first floor apartment where the victim was waiting on the couch. Based on the mother's direction and actions, police assumed that she had apparent authority to allow entry into the apartment even though she lived in the second floor apartment.

**Conclusion:** The SJC held that the search of the premises in **Santos** was lawful based on the mother's apparent authority. **Santos** established that if it is unclear who resides in the house and there are no exigent circumstances, police can ask who has authority over the premise prior to entering. In **Santos**, the SJC found that it was reasonable for police to enter the home first floor apartment without asking if she had authority based upon the actions of the victim's mother. Once inside the apartment, police observed the grandmother, who lived there and never objected to police entering her home. Based on the facts in Santos, it was reasonable for police to reasonably conclude that the mother, third party, had apparent authority to give consent for entry into the home. If "police are faced with contrary facts tending to suggest that the person consenting to the search lacks actual authority, police have a duty of further inquiry." "Absent those contrary facts or 'surrounding circumstances [that] could conceivably be such that a reasonable person would doubt its truth,' ... an officer's conclusion that he has consent to enter a premises, if based on 'facts, not assumptions or impressions,' may satisfy the first of the two-part inquiry of due diligence."

### **1<sup>st</sup> Issue: Warrantless entry**

The SJC held that it was reasonable for police to believe they had consent to enter the apartment based on the circumstances.

1. Nature of the call involved a potential rape of a child,
2. Victim's mother opened door for police and brought the police inside the apartment without any objection, and
3. Victim was waiting for police on couch inside first floor apartment

### **Questions Police can ask for clarification**

1. Ask if the person authorizing entry into the home has authority over the premises?
2. Based on the facts or circumstances, is it reasonable to conclude that the person authorizing entry into the home has actual or apparent authority over the premises?

## **Arrest Warrants**

***Commonwealth v. Gentile, 466 Mass. 817 (2014):*** Both the U.S. Constitution and the Mass. Declaration of Rights art. 14 require that police who enter an individual's residence to execute an arrest warrant have a reasonable belief that the location to be searched is the arrestee's residence, and a reasonable belief that the arrestee is in his or her residence at the time the arrest warrant is executed. The "reasonable belief" standard is an objective standard and is less exacting than probable cause.

A law enforcement official's belief must be supported by specific articulable facts that, based on the totality of circumstances, permit a reasonable inference that, at the time of entry, the defendant is in the premises. The entering officer's experience or expertise may bear on the strength of that inference, but only to the extent the officer can articulate what he or she has learned from his or her experience or expertise that reasonably would permit an inference from information that otherwise would not suffice.

## **Strip Searches**

***The SJC holds that the police conducted a strip search when they pulled the waistband of the defendant's underwear and retrieved cocaine that was initially discovered, but not identified as either a weapon or contraband, during a pat-frisk.***

***Commonwealth v. Amado, 476 Mass. 147 (2016):*** While on patrol in an unmarked vehicle Brockton police observed a green Acura pulling out of a nearby gasoline station. One of the officers recognized the defendant, Aderito Amado, as the front seat passenger from a prior arrest for unlawful possession of a firearm. The police stopped the vehicle because its registration plate was not properly affixed. All four of the police officers got out of their vehicle and approached the automobile with two officers on each side. Detective George Almeida observed the defendant reach his left arm behind his body and he stated, "We got movement up front." A second officer observed the defendant bring his left arm back down to the front of his body.

While the operator of the motor vehicle gave police his driver's license and registration, the defendant avoided eye contact with the police, appeared nervous and was breathing rapidly with trembling hands. Police ordered the defendant out of the automobile due to concerns for officer safety and they conducted a pat-frisk. An object believed to be a roll of cash was recovered. When asked how much cash he had, the defendant told police that roll contained \$500 in cash.

Continuing the pat-frisk, the police felt an object behind the defendant's testicles which they did not believe was a gun. The officer yelled that the defendant was "jocking" something. One of the officers pulled back the waistband of the defendant's shorts and underwear to view his bare backside. The detectives observed a plastic bag protruding from the defendant's buttocks. At the sight of the bag, the police handcuffed the defendant who declined to remove the bag himself.

A police supervisor arrived and after taking the defendant between two nearby buildings, the police pulled out the defendant's shorts and underwear, this time shining a

flashlight on his bare buttocks. The contents of the bag were not visible, but the bag was not inside the defendant's rectum. The police supervisor pulled the bag out from the defendant's buttocks. The drug laboratory later determined that the bag contained approximately twenty-four grams of "crack" cocaine.

The defendant was arrested and charged with trafficking fourteen grams or more of cocaine, in violation of G. L. c. 94C, § 32E (b). He filed a motion to suppress arguing that the police conducted a strip search without probable cause during the pat-frisk. The Commonwealth contended that the court limit the inquiry to a determination whether pulling the defendant's shorts and underwear away from his body constituted a strip search under **Commonwealth v. Morales**, 462 Mass. 334, 342 (2012), and argued that the search was not a strip search or, in the alternative, that the search was reasonable because it was conducted away from the road and only the officers viewed the defendant's bare skin. The motion was denied and the SJC heard the case on appeal.

**Conclusion:** The SJC concluded that the body search of the defendant constituted a strip search and the police lacked probable cause to justify the search, and it was therefore unreasonable. The motion to suppress the contents of the bag retrieved during the strip search should have been allowed and the conviction was vacated.

<sup>st</sup>  
**1 Issue: Was the stop and the exit order justified?**

The SJC determined that the police were justified in stopping the vehicle after they observed a traffic violation. **Commonwealth v. Santana**, 420 Mass. 205, 207 (1995). The police initially pursued the vehicle because they recognized the defendant as a passenger and they wanted to investigate further based on his prior arrest for possession of a firearm. When the police noticed the vehicle's unlit registration plate during the pursuit, stopping the vehicle was lawful deemed lawful.

Following the motor vehicle stop, the exit order and subsequent pat frisk were also deemed justified. Whenever there is safety issue or an officer develops a reasonable suspicion based on specific and articulable facts that the passenger was engaged in, or about to engage in, criminal activity apart from any offense committed by the driver, the courts have found that exit orders are justified. **Commonwealth v. Torres**, 424 Mass. 153, 158-159 (1997). Here the motion judge concluded that the defendant's recent arrest for unlawfully possessing a firearm in a vehicle coupled with the defendant's arm movements as the officers approached the vehicle and lack of eye contact created a heightened safety risk. The defendant's rapid breathing and the fact that the vehicle was stopped in a high crime area also justified the exit order. The SJC affirmed the motion judge's factual findings concerning the exit order.

<sup>nd</sup>  
**2 Issue: Did the police exceed the scope of the pat-frisk?**

The SJC held that the police exceeded the scope of the protective search by conducting the equivalent of a strip search. See **Commonwealth v. Torres**, 433 Mass. 669, 675-676 (2001). Protective searches are reasonable if "confined to what is minimally necessary to learn whether the suspect is armed and to disarm him once the weapon is discovered." **Commonwealth v. Almeida**, 373 Mass. 266, 272 (1977). "In most instances the search must be confined to a pat-down of the outer clothing of the suspect." However, under the

"plain feel" doctrine, an officer may seize contraband discovered during a Terry-type frisk if the officer feels an object whose contour or mass makes its identity immediately known.

**Minnesota v. Dickerson**, 508 U.S. 366, 373, 375-377 (1993).

In the present case, the police did not observe any protrusions or suspicious bulges in the defendant's athletic shorts. However, during the pat-frisk, the officer felt an object behind the defendant's testicles that he knew was not a weapon. Because the object was not a weapon, there was no safety exigency justifying a search of the defendant's person. "Police have the privilege to search further after the pat down gives indication that a weapon is present." A further search was not warranted under the "plain feel" doctrine because the officer was unable to identify the contraband nature of the object by touch alone. Although the location of the object was certainly suspicious, it may have justified additional investigation, but not a further search of the defendant's person. See **Morales**, 462 Mass. at 339. The SJC determined that the police exceeded the scope of the search once it was determined that the object was not a weapon.

### <sup>rd</sup> **3 Issue: Did search of the defendant amount to a strip search?**

The SJC considered whether the police conducted a strip search and whether they had probable cause to do so. A strip search occurs "when a detainee remains partially clothed, but in circumstances during which a last layer of clothing is moved (and not necessarily removed) in such a manner whereby an intimate area of the detainee is viewed, exposed, or displayed." **Commonwealth v. Morales**, 462 Mass. at 342. In **Morales**, the SJC explained that although complete nakedness was a determining factor in the strip search at issue in **Commonwealth v. Prophete**, 443 Mass. 548 (2005), total undress is not necessary to qualify as a strip search.

Here, the motion judge did not address whether the initial pulling back of the defendant's clothing during the pat-frisk was a strip search and the Appeals Court assumed it was a strip search requiring probable cause. The SJC did not question this initial search because no evidence was seized. However, the pulling back the waistband of the defendant's underwear, exposing his bare skin, using a flashlight to light the area, and retrieving an object from the defendant's private area was a strip search requiring probable cause within the meaning of **Morales**.

In order to conduct a strip search, police need probable cause, which they did not have in this case. Article 14 of the Massachusetts Declaration requires that probable cause exist before a strip or visual body cavity search can be conducted. See **Commonwealth v. Prophete**, 441 Mass. at 553. "Strip searches by their very nature are humiliating, demeaning, and terrifying experiences that, without question, constitute a substantial intrusion on one's personal privacy rights." **Commonwealth v. Morales**, 462 Mass. at 339-340. Such searches may precede a formal arrest as long as probable cause existed at the time the search was made, independent of the results of the search. **Commonwealth v. Clermy**, 421 Mass. 325, 330 (1995).

Here, the motion judge found that the police developed probable cause to arrest the defendant for a narcotics violation during the pat-frisk. As a result, the strip search was

deemed a search incident to arrest for a suspected drug offense. The Commonwealth compared the current case to **Clermy** where a defendant was arrested on an outstanding motor vehicle warrant while sitting on the steps of a known “crack” house in an area of high arrest rates for narcotics violations. **Commonwealth v. Clermy**, 421 Mass. at 326. After the pat-frisk revealed a paging device and sixty dollars in cash, the police placed the defendant in a cruiser and conducted a second safety search, which revealed a hard object in his genital area. **Id.** at 327. The police retrieved a plastic prescription bottle containing twenty-five pieces of “crack” cocaine.” The SJC in **Clermy** determined that “it is eminently reasonable to infer that a prescription bottle carried in this manner would contain contraband, and, most probably, a controlled substance.” **Id.** at 330-331.

The Commonwealth contends that the police were justified conducting a protective pat-frisk after the defendant made unusual movements. At the time, the police did not suspect that the defendant was engaged in illegal drug activity but during the pat-frisk, the police developed probable cause for an arrest. The SJC did not agree with the Commonwealth and concluded that the police officer’s reasonable suspicion could not have ripened into probable cause without additional and impermissible searching of the defendant’s person. “The facts here placed the defendant in a probable cause “no man’s land” as far as the police were concerned, where the police had reasonable suspicion to believe the defendant was engaged in something illegal but did not have probable cause to believe that the suspected illegal activity involved a drug offense.”

The SJC further stated that in the case the defendant was a passenger in a motor vehicle that was stopped for pre-textual grounds to investigate the defendant due to his past arrest for possession of a firearm. The past arrest has no connection to contraband. Although the defendant denied having cash on him, it was insufficient to raise an officer’s reasonable suspicion into probable cause.

If the SJC had found that the police had probable cause, the search would have to be reasonable. The search in this case was unreasonable. Even though the police took the defendant between two buildings to remove the bag from his genital area, that did not render the search private where any number of persons could have observed the encounter.

### **Constructive Possession**

**Commonwealth v Lovering**, 89 Mass. App. Ct. 76 (2015): In August 2011, the defendant’s wife sought and obtained an abuse prevention order against him. The order required the defendant to stay away from the apartment he shared with his wife. The defendant was only allowed to return to the apartment with a police escort to pick up his belongings. A month after the abuse prevention order issued, the defendant’s wife found the defendant’s loaded handgun in the apartment she had shared with him for twelve years. The gun was in a leather pouch contained within an old wooden box among the defendant’s other personal belongings on the floor of the living room. The defendant had not returned to the apartment since the order was entered.

The police charged the defendant with possession of a firearm without a firearm identification card, G. L. c. 269, § 10(h), violation of the storage statute, G. L. c. 140, § 131L, and violation of the abuse prevention order by failing to surrender the gun, G. L. c. 209A, § 7. The case



went to trial and the defendant was convicted on all three charges. The defendant appealed the convictions and argued that there was insufficient evidence to prove he constructively possessed the firearm.

**Conclusion:** The Appeals Court holds that the defendant's absence from an apartment for a month pursuant to a 209A order prevented the Commonwealth from proving that he constructively possessed his handgun that he left unsecured in the apartment after he departed, but that the defendant's ownership of the handgun enabled the Commonwealth to prove that he violated the firearm storage statute pursuant to G.L. c. 140, § 131L.

**1<sup>st</sup> Issue: The Appeals Court held there was insufficient evidence to prove that the defendant constructively possessed the firearm found in the apartment.**

In order to establish constructive possession, "there must be evidence sufficient to infer that the defendant not only had knowledge of the item, but had the ability and intention to exercise dominion and control over it." *Commonwealth v. Frongillo*, 66 Mass. App. Ct. 677, 680 (2006). Although the gun was found among the defendant's personal effects, he no longer lived in the apartment. Since the defendant had not been in proximity of the gun for almost a month, there was no evidence as to when if ever he might return to the apartment, and there was no evidence that he was anywhere near the gun when it was found in September.

**2<sup>nd</sup> Issue: The Appeals Court held that G.L. c. 140 § 131L applied to weapons that are neither carried nor under the control of their owner or other authorized user.**

While the Court reversed the defendant's conviction relating to the constructive possession charge, it affirmed the convictions for unlawful storage of a firearm and for violating the abuse prevention order. The defendant's wife had relayed to police that the "gun was her husband's," and she had found it in a leather pouch within a wooden box on the floor of the living room. The storage statute imposes liability on owners of firearms who have neither actual nor constructive possession of the weapons. Furthermore, the storage statute "applies to weapons when they are neither carried nor under the control of their owner or other authorized user." *Commonwealth v. Patterson*, 79 Mass. App. Ct. 316, 318 (2011).

Lastly, the defendant violated an abuse prevention order by failing "to surrender all firearms, rifles, shotguns, machine guns and ammunition which he then controls, owns or possesses," pursuant to G. L. c. 209A, § 3B. When the abuse order issued in August 2011, the defendant was mandated by law to turn over his all of his firearms which would have included this gun. The defendant failed to comply with the law and as a result the Court affirmed his conviction on this charge.

- ❖ **TRAINING TIP:** Police are not required to allege that an offense occurred the same date that the evidence is seized. If police have probable cause to charge the crime on an earlier date, they may do so. In this particular case, the Commonwealth could have alleged that both the 10(h) and the improper storage charges occurred on a date prior to the issuance of the 209A order when the defendant lived in the dwelling. If that

were the case, the court may have reached a different holding regarding the proof of the defendant's constructive possession of the handgun.

### **Anonymous Tips**

- ❖ **TRAINING TIP:** Last year the Appeals Court ruled heard this case and denied the motion to suppress. The decision was included in last year's inservice materials. The SJC affirmed the Appeals Court's holding, but for different reasons.

***Commonwealth v. Depiero***, 473 Mass. 450 (2016): After receiving a 911 call that there was a vehicle swaying all over Memorial Drive near Harvard Square and receiving the license plate number, Trooper Dwyer located the vehicle near a Belmont address. The dispatcher had issued a broadcast that included the description of the vehicle, the license plate, the location of vehicle and the address of the registered owner. The dispatcher also relayed that the owner was on probation for a prior drunk driving offense. Trooper Dwyer observed the vehicle park outside of a home in Belmont. The defendant, John Depeiro, stepped out of his vehicle and nearly fell to the ground. Trooper Dwyer noticed that Depiero's hair was "wild and unkept" and smelled an odor of alcohol. Depiero was able to produce his license and registration and he told Trooper Dwyer that he was coming from Soldier's Field Road in Cambridge. Depiero also admitted that he had consumed one to two drinks. Trooper Dwyer arrested Depiero for operating a motor vehicle while under the influence of alcohol after he failed the field sobriety tests. Depiero filed a motion to suppress arguing that the anonymous call was unreliable.

The judge denied the motion and concluded that although an ordinary citizen placed the 911 call and not an informant, the citizen provided detailed information that indicated he had witnessed firsthand a motor vehicle driving erratically on the roadway." Even though the caller was not identified -- or identifiable -- the tip bore adequate indicia of reliability, because the caller's report was based on his personal knowledge, and the information he provided could be accorded more weight than information from an (anonymous) informant as a result of his status as an ordinary citizen. Additionally, the motion judge also found that the information provided by the caller had been corroborated by the police and therefore the stop was lawful because it was supported by reasonable suspicion. Depiero appealed the motion judge's findings.

**Conclusion:** The SJC affirmed the denial of the motion to suppress but for different reasons than the Mass. Appeals Court.

The SJC determined that even though the caller was anonymous, the reliability of the caller can be established through independent police corroboration. The SJC declined to adopt the holding that the Supreme Court found in ***Navarette*** whereby, the Court attributed veracity to all 911 callers because the telephone system is recorded. ***Navarette***, 124 S.Ct. at 1694. The SJC found that recording the caller's phone number does not prove who made the call.

Rather the SJC found that even where a 911 telephone call is anonymous, the Commonwealth can still establish a caller's reliability "through independent corroboration by police observation or investigation of the details of the information provided by the caller . Independent corroboration is relevant only to the extent that it was known to the police before

the stop was initiated" See **Commonwealth v. Barros**, 435 Mass. 171, 178 (2001). Here the police observation and investigation in this case adequately corroborated the details provided by the unidentified caller, such that the information exhibited "sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop." **Florida v. J.L.**, 529 U.S. 266, 270 (2000).

Trooper Dwyer corroborated the location of the driver at the time of the 911 call and he also observed a vehicle that matched the unidentified caller's description arriving at the address which was broadcasted by dispatch. See **Costa**, 448 Mass. at 518 (police arrived within minutes of anonymous caller's tip, and "were able to corroborate many of the [albeit innocent] details provided by the caller"). Additionally Trooper Dwyer learned from dispatch that the defendant was on probation for the same type of criminal activity of which he was suspected further corroborated the anonymous call. See **Commonwealth v. Germain**, 396 Mass. 413, 418 (1985) All the above details provide a level of corroboration beyond that of "innocent" or easily obtainable facts, see **Alvarado**, 423 Mass. at 272, and the information contained in the 911 call therefore passed the less rigorous veracity test needed under our reasonable suspicion analysis. See **Lyons**, 409 Mass. at 19.

### **Massachusetts Cases Regarding Anonymous Tips**

**Commonwealth v. Lubiejewski**, 49 Mass. App. Ct. 212 (2000): An unidentified motorist reported via 911 call that a pickup truck with Massachusetts license plate number D34-314 was traveling on the wrong side of Route 195 in the vicinity of Route 140 in New Bedford. The motorist called again and relayed that truck was driving on the correct side of the highway. A state trooper ran a check of the vehicle and found that it was registered to the defendant. The state trooper drove to the address and stopped a vehicle matching the motorist's first description. The trooper did not make any observations concerning the operation of the vehicle. The trooper arrested the defendant for concluded operating his vehicle while under the influence of alcohol, and arrested him. The defendant was convicted and filed an appeal. The Appeals Court vacated the conviction and concluded that the troopers' observations of defendant's vehicle were insufficient to corroborate report received from anonymous informant. Additionally, the Court found that the stop of the defendant's vehicle was not justified under emergency doctrine or under community caretaking doctrine.

**Commonwealth v. Lyons**, 409 Mass. 16 (1990): The Court found that an anonymous tip along with lack of police corroboration failed to establish reasonable suspicion to stop defendants. The tipster provided no information regarding the basis of the informant's knowledge or reliability, and the quantity and quality of the details the police corroborated were insufficient to establish any degree of suspicion that could be deemed reasonable. If the anonymous tip provided some "specificity of non-obvious facts, which indicated that the tipster had some familiarity with the suspect, or specific facts, which predicted behavior," the Court may have found that reasonable suspicion existed.

**Commonwealth v. Hurd**, 29 Mass. App. Ct. 929, 930, 557 (1990): The Court found that the information the police received from an anonymous caller that a man who appeared to be drunk was getting into a blue automobile with New Hampshire license plates in front of a package store with three small children in the vehicle. The police responded to the call and when they arrived at the location, they saw stopped the vehicle as they saw it approaching the

entrance to Route 128, a high speed highway. The Court found the stop was reasonable based on the facts.

***Commonwealth v. Famania***, 79 Mass. App. Ct 365, (2011): An anonymous call regarding a person getting off a bus with a handgun in his backpack led Court to conclude that there was reasonable suspicion to do a pat-frisk.

***Commonwealth v. Love***, 56 Mass. App. Ct. 229 (2002): The source of the tip or information reported to the police was based on the "witness' personal observations and the reliability (veracity) prong will be satisfied when the source of the tip or information is identifiable if not identified." In ***Love***, a passenger in a vehicle stopped at a police barracks to report that there were two vehicles racing. Even though the trooper did not obtain the individual's name the Court held that the individual was identifiable by the license plate that the desk officer had recorded.

***Commonwealth v. Carey***, 407 Mass. 528 (1990): The Court held in ***Carey*** that "if the citizen or victim informant is an eyewitness, this will be enough to support probable cause even without specific corroboration of reliability." In ***Carey***, student reported to a teacher that he observed the defendant in possession of a gun in school. While the student's identity was not disclosed, police treated the report reliable based on the student's eyewitness account and the teacher's knowledge of the student's identity.

***Commonwealth v. Lauture***, 84 Mass. App. Ct., 1115 (2013): The police received a 911 report from an unidentified caller that a man with black 'long dreads' was carrying a gun and was about to shoot someone at specific location. The police acted upon the call since dispatch provided police with a specific location, name, gender and distinctive hairstyle. Based on all this information, it was 'reasonable for the police' to suspect that the defendant was the individual who prompted the 911 call given that at least one police officer, who arrived on the scene within seconds of the call, testified that the defendant was the only person whom he observed in a crowd of fifty to seventy people who matched the caller's description. The police arrived and removed the defendant from this car and frisked him. The defendant appealed arguing that an unidentified caller contained sufficient evidence of reliability and a basis of knowledge to justify the officers' actions.

**Conclusion:** The Appeals Court concluded that the facts presented in this case satisfied the reliability and knowledge prong that provided police with reasonable suspicion to pat-frisk the defendant. The Court found that the caller was observing the suspect as he made the call and had **knowledge** through first hand observations. The caller gave panicked observations that the suspect was about to shoot someone and he pleaded for police to respond immediately because the suspect was "standing right there."

The second issue was whether the detail the caller provided was sufficient to establish the **reliability** of the call. The caller provided the location of both the suspect and the caller, the suspect's first name, the type of handgun, and the location of both caller and suspect. In addition to the information that the caller supplied, the police officers were able to corroborate the information through their own observations. When the police arrived, they saw a person whose appearance was consistent with the 911 call description of a male with long dreadlocks and who 'retreated' as they approached. The police's suspicions were further raised when they commanded the defendant to exit the vehicle and he "glanced in the direction of the

approaching officer and made a quick and suspicious movement to the area of the middle console, as if reaching for or placing something." These suspicious movements, in conjunction with the defendant being the only person at the location matching the caller's description, justified the exit order to the defendant. The Court concluded that all these factors gave the police reasonable suspicion to pat frisk the defendant for their safety and the safety of others.

### **Supreme Court Case on Anonymous Tips**

**Navarette v. California**, 134 S.Ct. 1683 (2014): The Supreme Court concluded that an anonymous call can provide police with reasonable suspicion to stop the vehicle. The caller's eyewitness account of the truck's reckless driving coupled with the fact that the police corroborated the truck's description, location and direction established that the tip was reliable to justify the stop. The specific details about the vehicle including the color, style and type of vehicle along with the license plate which would suggest the caller possessed eyewitness knowledge of the alleged driver. Additionally, the police were able to corroborate specific details that were provided to them by the call. Typically, reports that are "contemporaneous with the event are perceived as more trustworthy because there is less likelihood of deliberate or conscious misrepresentation." Lastly, the Supreme Court found the 911 caller reliable because she called the emergency system where calls are recorded and can lead to the identification of the caller.

- ❖ **TRAINING TIP: Navarette** does not establish that every anonymous report of reckless driving gives police reasonable suspicion to stop a vehicle. If the prosecutor had introduced the 911 tape or dispatcher information during the suppression hearing, the case may never have reached the Supreme Court.

**United States v. Cortez**, 449 U.S. 411 (1981): The Supreme Court has concluded that police are permitted to conduct brief investigative traffic stops under the 4<sup>th</sup> Amendment if the officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." The "reasonable suspicion" necessary to justify such a stop "is dependent upon both the content of information possessed by police and its degree of reliability," which is particularly relevant when analyzing anonymous tips.

**Adams v. White**, 407 U.S. 143 (1972): "An anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," because "ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations," and an anonymous tipster's veracity is "'by hypothesis largely unknown, and unknowable.'" However an anonymous tip can demonstrate "sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop."

### **Misleading a Police Officer**

***The Appeals Court holds that swallowing drugs is a violation of the G. L. c. 268, § 13B and because it constitutes misleading a police officer!***

**Commonwealth v. Josefa Tejada**, 89 Mass. App. C., 625 (2016): On October 8, 2014, Boston Police were on patrol in area known for open drug dealing. Officer David Crabbe observed a male identified as Christopher Willet walking with the defendant, Josefa Tejada, towards Shawmut Avenue. Officer Crabbe lost sight of both individuals, and found them later

behind a parked car near Madison Park Court. Willet and Tejada made eye contact with Officer Crabbe and then began to walk away. At this point, Officer Crabbe saw Jim Figueroa, a known heroin user squatting behind a car. Figueroa appeared to be concealing something in his right hand. When Figueroa refused to show his hands, Officer Crabbe grabbed his right arm and a small plastic bag of a light brown powdery substance fell to the ground. Figueroa was arrested and at that point, Tejada picked up the plastic and swallowed it.

Tejada was charged with possession of heroin, G. L. c. 94C, § 34, and misleading a police officer, G. L. c. 268, § 13B. Tejada filed a motion arguing the police lacked probable cause for both charges. The motion judge allowed the motion related to the charge of misleading a police officer and found that it requires an act of deception and that the ingestion of the substance was not misleading conduct.

**Conclusion:** The Appeals Court held that there was probable cause that the defendant concealed and destroyed evidence with intent to interfere with a criminal investigation and that such conduct was misleading a police officer pursuant to G.L. c. 268, § 13B (1) (c), and it vacated the order dismissing the charge.

G.L. c. 268, § 13B (1) (c) provides that whoever, directly or indirectly:

- (1) Willfully misleads;
- (2) A police officer;
- (3) With intent to impede, obstruct, delay, harm, punish or otherwise interfere with a criminal investigation, shall be punished.

In ***Commonwealth v. Figueroa***, 464 Mass. 365 (2013), the SJC adopted the definition of misleading conduct from the Federal witness tampering statute, 18 U.S.C. § 1512. The significant portion from that statute includes that knowingly, using a trick, scheme or device with intent to mislead falls within the parameters of the witness tampering statute.

Based on the facts in this case, Tejada's affirmative act of picking up and swallowing the suspected heroin was a trick. The Appeals Court found that Tejada's mischievous act was designed to outwit the police by preventing them from seizing evidence and proving its chemical composition. "It is reasonable to infer that swallowing the suspected heroin was an affirmative act committed for the purpose of interfering with and impeding a criminal investigation."

The Appeals Court further stated that its interpretation of misleading conduct was consistent with the 2006 legislative amendment which expanded the scope of § 13B. Misleading conduct was criminalized and police officers were added to the list of victims under the expanded statute.

### **Attenuation Doctrine**

***Utah v. Strieff***, 136 S. Ct. 2056, (2016): The issue before the court is does the attenuation doctrine apply when an officer makes an unconstitutional investigatory stop; learns during that

stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest?

**Background:** Police received an anonymous tip that there was narcotics activity at particular residence. The officer from the narcotics division conducted intermittent surveillance of the home and he observed visitors arriving and the leaving the home. One of the visitors was the defendant, Strieff, who was stopped by the officer and asked what he was doing at the residence after the officer observed him exit the house and walk toward a nearby convenience store.

As part of the stop, the police requested identification and the defendant produced an identification card. Dispatch informed police that the defendant had an outstanding arrest warrant for a traffic violation. The police arrested the defendant and conducted a search incident to arrest which led to the discovery of a baggie of methamphetamine and drug paraphernalia. The defendant appealed and argued that the detective had unconstitutionally stopped him and therefore any evidence gained pursuant to the stop should be excluded from his trial. The motion to suppress was denied by the trial court but the Utah Supreme Court reversed, holding that the drugs should have been suppressed at the defendant's trial. The State appealed to the United States Supreme Court.

**Conclusion:** The Supreme Court held that the evidence the officer seized as part of the search incident to arrest is admissible because the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest.

The Supreme Court has established that the exclusionary rule encompasses both the "primary evidence obtained as a direct result of an illegal search or seizure" and "evidence later discovered and found to be derivative of an illegality," the so-called "'fruit of the poisonous tree.'" **Segura v. United States**, 468 U. S. 796, 804 (1984).

There are several exceptions to the rule. Three of these exceptions involve the causal relationship between the unconstitutional act and the discovery of evidence. First, the independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source. See **Murray v. United States**, 487 U. S. 533, 537 (1988). Second, the inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source. See **Nix v. Williams**, 467 U. S. 431, 443-444 (1984). Third, and at issue here, is the attenuation doctrine, where evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." **Hudson, supra**, at 593.

The Supreme Court here had to consider whether the attenuation doctrine applied and whether the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug-related evidence on Strieff 's person. The Court previously considered three factors in **Brown v. Illinois**, 422 U. S. 590, which it reexamined here to evaluate whether the attenuation doctrine applied here.

1. **Temporal proximity:** The police officer discovered drugs minutes after stopping the defendant
2. **Presence of intervening circumstances:** The discovery that there was a valid arrest warrant, predating the investigation and entirely unconnected with the stop, favors finding sufficient attenuation between the unlawful conduct and the discovery of evidence. That warrant authorized the police to arrest the defendant and subsequently search him.
3. **Purpose and flagrancy of the official misconduct:** After the unlawful stop, the officer's conduct was lawful, and there was no indication that the stop was part of any systemic or recurrent police misconduct.

The Supreme Court evaluated the above factors and found that although Officer Fackrell lacked reasonable suspicion to initially stop Strieff, the discovery of the warrant broke the causal chain. Officer Fackrell was at most negligent because he failed to verify that Strieff may have been a short term visitor to the drug house. Nothing prevented him from approaching Strieff simply to ask. While Officer Fackrell's decision to initiate the stop was mistaken, his conduct thereafter was lawful. The officer's decision to run the warrant check was a "negligibly burdensome precaution" for officer safety. **Rodriguez v. United States**, 575 U. S. \_\_\_, (2015). (And Officer Fackrell's actual search of Strieff was a lawful search incident to arrest. See **Gant, supra**, at 339. Officer Fackrell saw Strieff leave a suspected drug house. And his suspicion about the house was based on an anonymous tip and his personal observations.

The Supreme Court held that the evidence seized from Strieff 's person was admissible because the unlawful stop was sufficiently attenuated by the preexisting arrest warrant. Although the illegal stop was close in time to Strieff's arrest, that consideration is outweighed by two factors supporting the State. The outstanding arrest warrant for Strieff's arrest is a critical intervening circumstance that is wholly independent of the illegal stop. The discovery of that warrant broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling Officer Fackrell to arrest Strieff. Additionally, there is no evidence that Officer Fackrell's illegal stop reflected flagrantly unlawful police misconduct. Furthermore, the evidence Officer Fackrell seized as part of his search incident to arrest is admissible because his discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to arrest. The judgment of the Utah Supreme Court, accordingly, is reversed.



### **III. Searching Cell Phones and Revisiting the Impact of Social Media**

#### **Particularity Requirement**

**The SJC defines a new standard governing the search for evidence in an electronic device.**

"Most fixed premises cases still analyze whether the physical container at issue was 'capable of containing the object of the search.'"

"At a minimum, the standard that governs the proper scope of a search of an electronic device . . . for evidence for which probable cause has been found is **whether that evidence might reasonably be found in the electronic files searched**; 'capable of containing' is far too broad."

**Commonwealth v. Dorelas, 473 Mass. 496 (2016):** The defendant was indicted on various charges for his involvement in a shooting that took place in the Hyde Park section of Boston. As part of the investigation, investigators obtained a search warrant for the defendant's iPhone authorizing a search for the following:

"Subscriber's name and telephone number, contact list, address book, calendar, date book entries, group list, speed dial list, phone configuration information and settings, incoming and outgoing draft sent, deleted text messages, saved, opened, unopened draft sent and deleted electronic mail messages, mobile instant message chat logs and contact information mobile Internet browser and saved and deleted photographs on an Apple iPhone, silver and black, green soft rubber case. Additionally, information from the networks and carriers such as subscriber's information, call history information, call history containing use times and numbers dialed, called, received and missed." **Id.** at 500.

The defendant filed a motion to suppress the photographs obtained from the search of his iPhone, which was denied after an evidentiary hearing. In his arguments to the motion judge, the defendant conceded that the search warrant affidavit provided probable cause to search the iPhone for text messages and photographs attached to text messages relevant to the shooting under investigation, but that it was unreasonable to search the photograph files on his iPhone for such evidence. The motion judge held, in relevant part, that it was appropriate for the police to search the files on the defendant's iPhone that contained his photographs because the affidavit "furnished probable cause to conduct an electronic search of [his] cell phone" and because threats can be communicated by way of photographs and stored in the iPhone's photograph file.

**Conclusion:** The SJC ruled that the defendant's motion to suppress was properly denied. In its ruling, the court stated the following:

"However, in the virtual world, it is not enough to simply permit a search to extend anywhere the targeted electronic objects possibly could be found, as data possibly could be found anywhere within an electronic device. Thus, what might have been an appropriate limitation in the physical world becomes a limitation without consequence in the virtual one." **Id.** at 502.

"Nevertheless, much like a home, such devices can still appropriately be searched when there is probable cause to believe they contain particularized evidence. See **Commonwealth v. McDermott**, 448 Mass. at 770-772 (2007). However, given the properties that render an iPhone distinct from the closed containers regularly seen in the physical world, a search of its many files must be done with special care and satisfy a more narrow and demanding standard. See **Hawkins v. State**, 290 Ga. 785, 786-787, 723 S.E.2d 924 (2012) (cellular telephone is "roughly analogous" to container, but large volume of information contained in cellular telephone "has substantial import as to the scope of the permitted search," which must be done with "great care and caution"). "Officers must be clear as to what it is they are seeking on the [iPhone] and conduct the search in a way that avoids searching files of types not identified in the warrant." **United States v. Walser**, 275 F.3d 981, 986 (10th Cir. 2001), cert. denied, 535 U.S. 1069 (2002). "[A] computer search 'may be as extensive as reasonably required to locate the items described in the warrant'" based on probable cause (emphasis added). **United States v. Grimmer**, 439 F.3d 1263, 1270 (10th Cir. 2006), quoting **United States v. Wuagnew**, 683 F.2d 1343, 1352 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983)." Id. at 502-503.

### **Cell Site Location Information**

**Commonwealth v. Estabrook**, 472 Mass. 852 (2015): The Commonwealth may obtain historical Cell Site Location Information (CSLI) for a period of six hours or less relating to an identified person's cellular telephone from the cellular service provider without obtaining a search warrant, provided the Commonwealth has obtained a court order prescribed by 18 U.S.C. § 2703.

**18 U.S.C. § 2703(d)** allows a court of competent jurisdiction to issue an order requiring a cellular telephone company to disclose certain types of records of customers, including CSLI, to a governmental entity if the government establishes that "**specific and articulable facts**" show "**reasonable grounds to believe**" that the records "**are relevant and material to an ongoing criminal investigation.**"

**Commonwealth v. Broom**, 474 Mass. 486 (2016): **The SJC defines the probable cause standard for the seizure of CSLI.** The probable cause standard applicable to cellular site location information (**CSLI**) is probable cause to believe that a particularly described offense has been committed and that the CSLI sought will produce evidence of such offense or will aid in the apprehension of a person who the applicant has probable cause to believe has committed such offense.

Where a search of a cellular telephone offering smartphone features and access to the Internet is sought, there must be probable cause that the device contains particularized evidence relating to the crime. The properties of such a telephone render it distinct from the closed containers regularly seen in the physical world, and a search of its many files must be done with special care and satisfy a more narrow and demanding standard than exists for establishing probable cause to search physical containers or other physical items or places. In particular, it is not enough that the object of the search may be found in the place subject to search. Rather, the affidavit must demonstrate that there is a reasonable expectation that the items sought will be located in the particular data file or other specifically identified electronic location that is to be searched.

***Commonwealth v Chamberlin***, 473 Mass. 653 (2016): A service provider may disclose customer records voluntarily to the government if the service provider believes in good faith that an “emergency involving danger of death or serious physical injury ... requires disclosure without delay of information relating to the emergency” pursuant to 18 U.S.C.S. § 2702(c)(1) and (4).

**18 U.S.C. § 2702(c):**

(c) **Exceptions for disclosure of customer records.** A provider described in subsection (a) may divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a)(1) or (a)(2))--

(1) as otherwise authorized in section 2703 [18 USC § 2703];

(2) with the lawful consent of the customer or subscriber;

(3) as may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service;

(4) to a governmental entity, if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency;

(5) to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under section 2258A [18 USC § 2258A]; or

(6) to any person other than a governmental entity.

**Dissemination of Child Pornography**

***Commonwealth v. Fred F., a Juvenile***, 89 Mass. App. Ct. 1118 (2016): The Court held that there was insufficient evidence to prove that a juvenile who was adjudicated delinquent disseminated harmful matter to a minor under G.L. c. 272, §28. “The definition of matter harmful to minors, set forth in G. L. c. 272, §31, inserted by St. 1974, c. 430, §12, states that the law’s requirements are met if the matter is obscene or if taken as a whole satisfies the following elements:

1. describes or represents nudity, sexual conduct or sexual excitement, so as to appeal predominantly to the prurient interest of minors;
2. is patently contrary to prevailing standards of adults in the county where the offense was committed as to suitable material for such minors; and
3. lacks serious literary, artistic, political or scientific value for minors.

In order for matter to qualify as obscene, material must satisfy three conditions if taken as a whole:

1. appeals to the prurient interest of the average person applying the contemporary standards of the county where the offense was committed;
2. depicts or describes sexual conduct in a patently offensive way; and
3. lacks serious literary, artistic, political or scientific value.’ G. L.c. 272, §31, as amended by St. 1982, c. 603.

In the current case, the images were not admitted to evidence so the only description involved the student's reaction of fear. Additionally, there was no indication that the images portrayed any sexual conduct or were offensive.

The Court examined whether the material could have qualified as harmful matter pursuant to G. L. c. 272, §31. The first element, requiring a description or representation of "nudity, sexual conduct or sexual excitement, so as to appeal predominantly to the prurient interest of minors," has not been supported by the evidence for the reasons set forth above. As stated, nudity was the only of these attributes in evidence, and no evidence of prurient appeal was proffered. Evidence relating to the second requirement of §31, that the material be "patently contrary" to prevailing standards among adults in the county where the material was displayed as suitable for display to minors, was lacking in two respects. On this record, no adult viewed the photographs at the time of the incident or any time thereafter, and no evidence of community standards was introduced. Finally, the Commonwealth failed to demonstrate that the photographs lacked literary, artistic, political or scientific value, in this instance "for minors." There was no evidence to address this issue. The Commonwealth provided insufficient evidence of all of the listed elements. The charges against the juvenile were dropped.

### **Verbal Conduct Through Text Messages**

***The SJC holds that the defendant's verbal conduct through text messages provided sufficient evidence for an indictment of manslaughter!***

***Commonwealth v. Michelle Carter***, 474 Mass. 624 (2016): On July 13, 2014, a Fairhaven police officer located the victim, Conrad Roy, dead in his truck, in a store parking lot. Roy had died after inhaling carbon monoxide and his death was ruled a suicide. Prior to his death, Roy had been receiving treatment for mental health issues since 2011 and previously had attempted suicide.

Police learned through the course of their investigation that Roy and the defendant, Michelle Carter, had been dating at various times including at the time of the Roy's death. Since Carter and Roy did not live in the same town, most of the contact took place through text messages and phone calls. The text messages exchanged between Roy and Carter revealed that she was aware of Roy's history of mental illness and his prior suicide attempt. The text message revealed that Carter "encouraged the victim to kill himself, instructed him as to when and how he should kill himself, assuaged his concerns over killing himself, and chastised him when he delayed doing so." The theme of those text messages can be summed up in the phrase used by the defendant four times between July 11 and July 12, 2014 (the day on which Roy committed suicide): "You just [have] to do it." In addition to the text messages, cell phone records confirm that Carter and Roy were talking while Roy was in his truck committing suicide. After the victim died, Carter sent a text to her friend relaying that she had commanded him to get back into his truck when he got out because he was "scared."

Carter had also asked Roy to delete the text messages between the two prior to his death. When Carter learned that the police were looking through the victim's cellular telephone, she sent a text message to her friend, that stated, "the police read my messages with him I'm done. His family will hate me and I can go to jail." Police found that Carter had

deleted some of the text messages and she lied to police about the content of her conversations with the victim. Finally, Carter acknowledged in a text message to her friend that she could have stopped the victim from committing suicide: "I helped ease him into it and told him it was okay, I was talking to him on the phone when he did it I could have easily stopped him or called the police but I didn't."

Since Carter was seventeen at the time of the incident, the Commonwealth indicted her as a Youthful Offender, G. L. c. 119, § 54 for involuntary manslaughter. Carter filed a motion to dismiss the Youthful Offender indictment, and argued that the Commonwealth failed to present sufficient evidence of involuntary manslaughter and that her conduct did not involve the infliction or threat of serious bodily harm. The trial court denied the motion. The SJC considered whether there was sufficient evidence to warrant the return of an indictment for involuntary manslaughter where the defendant's conduct did not extend beyond words.

**Conclusion:** The SJC affirmed the denial of the motion to dismiss and concluded that the verbal conduct at issue was sufficient to return an indictment for involuntary manslaughter under the Youthful Offender statute.

### **1<sup>st</sup> Issue: Did Carter's text messages qualify as involuntary manslaughter?**

There are two theories of involuntary manslaughter:

- (1) Wanton or reckless conduct; or
- (2) Wanton or reckless failure to act.

Here, Carter was charged with involuntary manslaughter due to her wanton or reckless conduct. Wanton or reckless conduct is "intentional conduct that involves a high degree of likelihood that substantial harm will result to another." See ***Commonwealth v. Welansky***, 316 Mass. 383, 399 (1944). "Wanton or reckless conduct is determined based upon whether (1) the defendant had specific knowledge or (2) whether a reasonable person should have known in the circumstances." "If the conduct is based on the objective measure of recklessness, the defendant's actions constitute wanton or reckless conduct. If the conduct is based on an what are reasonable person under the same circumstances would have realized the gravity of the danger, than the defendant's own knowledge, grave danger to others must have been apparent and the defendant must have chosen to run the risk rather than alter [his or her] conduct so as to avoid the act or omission which caused the harm." See ***Commonwealth v. Pugh***, 462 Mass. 482, 496-497 (2012).

Carter argued since she was neither physically present when the victim killed himself nor provided the victim with the instrument with which he killed himself, she did not cause his death by wanton or reckless conduct. Carter maintained that verbally encouraging someone to commit suicide, no matter how forceful, cannot constitute wanton or reckless conduct. Essentially, Carter contended that verbal conduct can never overcome a person's willpower to live, and therefore cannot be the cause of a suicide.

Although the SJC has never considered an indictment against a defendant on the basis of words alone, it has never required that a defendant commit a physical act in perpetrating a

victim's death in order to establish involuntary manslaughter. The SJC has also previously considered cases involving charges of involuntary manslaughter against a defendant where the death of the victim is self-inflicted. See, e.g., **Commonwealth v. Atencio**, 345 Mass. 627 (1963); **Persampieri v. Commonwealth**, 343 Mass. 19 (1961). In **Atencio**, the SJC upheld convictions against two defendants who were playing a game of Russian roulette and concluded that it would not be necessary that the defendants force the deceased to play or suggest that he play in order to be found guilty of involuntary manslaughter."

Similarly, in **Persampieri**, the SJC upheld a conviction of involuntary manslaughter based on the theory of wanton or reckless conduct, when a husband showed a reckless disregard of his wife's safety and the possible consequences of his conduct by taunting his wife about committing suicide and providing her the means to do so. Both of these cases highlight that wanton or reckless conduct requires a consideration of the likelihood of a result occurring, the inquiry is by its nature entirely fact-specific. "The circumstances of the situation dictate whether the conduct is or is not wanton or reckless. We need not- and indeed cannot-define where on the spectrum between speech and physical acts involuntary manslaughter must fall. Instead, the inquiry must be made on a case-by-case basis."

In the underlying case, Carter's relationship with the victim may have caused her verbal communications with him in the last minutes of his life on July 12, 2014, to carry more weight than mere words, overcoming any independent will to live he might have had. It is in those final moments, when the victim had gotten out of his truck, expressing doubts about killing himself, on which a verdict in this case may ultimately turn. In that moment of equivocation, the victim could have continued to delay his death, perhaps attempting suicide again at a later date, or perhaps seeking treatment; or he could have gotten back into the truck and followed through on his suicide. Rather, Carter commanded him to "get back in," obeyed, returning to the truck, closing the door, and succumbing to the carbon monoxide. The coercive quality of that final directive was sufficient in the specific circumstances to establish probable cause that the defendant's conduct was wanton or reckless, under either a subjective or an objective standard.

## **2nd Issue: Even if Carter's conduct was wanton and reckless, was it sufficient to cause the victim's death?**

The SJC held that the defendant's actions overbore the victim's willpower, there was probable cause to believe that the victim's return to the truck after the defendant told him to do so was not "an independent or intervening act" that, as a matter of law, would preclude his action from being imputable to her. See **Atencio**, 345 Mass. at 629-630. Even though it was the defendant's decision to commit suicide, Carter's text messages suggest that she had a significant influence over the victim. "The coercive quality of her verbal conduct overwhelmed whatever willpower the eighteen year old victim had to cope with his depression, and that but for the defendant's admonishments, pressure, and instructions, the victim would not have gotten back into the truck and poisoned himself to death." There was sufficient evidence presented to the grand jury for a finding of probable cause that Carter, by wanton or reckless conduct, caused the victim's death.

Lastly, the SJC distinguished the facts in this case from situations where a person coping with a terminal illness may be deciding to end his or her life. Here, Carter's "systematic

campaign of coercion on which the virtually present defendant embarked -- captured and preserved through her text messages -- that targeted the equivocating young victim's insecurities and acted to subvert his willpower in favor of her own." Based on the facts in this case, Carter's command to the victim in the final moments of his life to follow through on his suicide attempt was a direct, causal link to his death.

### **Facebook Chats**

**Commonwealth v. Gilman**, 89 Mass. App. Ct. 752 (2016): The defendant, David Gilman, was the victim's music teacher at Leicester middle school. On a school sponsored trip, the defendant was a chaperone and he spent a lot of time with the victim. At the end of the trip, the defendant put his cell number in the victim's cell phone. Afterwards, the defendant and the victim exchanged numerous, text messages. Over the course of the following summer, the defendant and the victim became "friends" on Facebook. The defendant and the victim corresponded by sending Facebook messages for the following, and their developing affection for each other. The defendant and the victim's relationship became physical whereby he touched her indecently and digitally raped her. The police became involved when they learned of the allegations.

Officer Julia Berry of the Leicester police department went to Middle School, and asked the defendant for his school issued laptop. The school technician gave each teacher a laptop and would allow the teacher to change the password. No person other than that teacher or the school technician could access that computer. The school's Internet use policy prohibited access to Facebook from the school. However, teachers were permitted to take the computers home and could access Facebook when away from the school's network. The police uncovered numerous chat messages between the victim and the defendant. The defendant was charged with rape of a child and indecent assault and battery. During trial he filed a motion in limine to exclude the chat messages from being admitted into evidence. The judge denied the motion and the defendant was convicted. The defendant appealed his convictions.

**Conclusion:** The Appeals Court affirmed the convictions and the denial of the motion to suppress. "The content of the Facebook chat conversations between the victim and the defendant was clearly relevant." The conversations contained numerous declarations of love by the defendant and the victim toward each other, and described their encounters, including those occasions on which the defendant assaulted the victim. The conversations also illustrate how the defendant cultivated the victim's feelings toward him, educated her about various forms of sexual interaction, and manipulated her insecurities to cause her to fear the loss of his affections. In several instances, the defendant's admissions corroborated the victim's trial testimony describing both the circumstances and the nature of the defendant's assaultive conduct. Though the lurid nature of the conversations undoubtedly caused prejudice to the defendant, the prejudice flowed directly from their properly probative effect to illustrate the development of the relationship between the defendant and the victim, its increasingly sexually charged character, and their shared reflection on several sexual encounters. The probative value of the Facebook chat evidence outweighed its potential for unfair prejudice.

The second issue the Court had to consider was whether there was sufficient evidence to establish that the defendant authored the Facebook chat messages. The Court found that

the messages originated from an account that included the defendant's name and picture. The messages were downloaded to a school issued laptop that the defendant had access to through a user name and password. There was no evidence that another person had access to the defendant's laptop. Additionally, the conversations that were extracted from the laptop contained personal references and other facts that were known only to the defendant and the victim. The evidence amply supported a conclusion that the defendant authored the Facebook chat messages. Based on all these factors, the Court found it was reasonable to conclude that the defendant had authored the text messages.

## ***IV. Interview, Interrogation and Miranda***

### **Overview of Miranda**

**MIRANDA REQUIRED = (a) Suspect in custody, and**

**(b) Interrogation**

### **Safe harbor Rule**

***Commonwealth v. McWilliams***, 473 Mass. 606 (2016): The Court held that the defendant's voluntary, unsolicited statements that were made more than six hours after an arrest, were not the product of police questioning, and therefore do not require suppression under the safe harbor rule established in ***Commonwealth v. Rosario***, 422 Mass. 48, 56-57 (1996). Robert McWilliams, the defendant, was convicted of robbery while armed and masked, occurring on July 7, 2011; and of attempted robbery, occurring on July 26, 2011. Unlike ***Fortunato***, the defendant in this case made statements to a police officer asking the officer to retrieve his glasses. The defendant's statements were voluntary and not made in response to police questioning. ***Commonwealth v. Fortunato***, 466 Mass. at 502-503.

***Commonwealth v. Rosario*, 422 Mass. 48 (1996):** In August of 1993, officers assigned to the Springfield police department's burglary squad were investigating a series of burglaries. They obtained the nickname and a description of the person who had apparently committed one of the burglaries. On August 25, the police saw the man fitting the description (hereinafter the "defendant") who declined to stop for questioning and fled. After a long pursuit, the police apprehended the defendant sometime between 2:30pm-3:30pm. He told the police that his name was Hector Gonzalez. A check at the police station disclosed that there were warrants outstanding for Hector Gonzalez. The defendant was arrested on the warrants and brought to the detective bureau where he was questioned as to his true identity. He was not advised of his right to use a telephone until about 5:00pm. He was booked about 5:00pm and admitted that his name was Hipolito Rosario and that he used the name Hector Gonzalez as an alias. The defendant was held overnight and interviewed in the morning in the detective bureau around 9:15am. The defendant waived his Miranda rights and admitted to committing several breaks. He also agreed to go with police to point out the residences he burglarized. After having the defendant's statement typed out, he was not taken to court until the afternoon of August 26<sup>th</sup>.

The defendant's statements were suppressed because the police delayed his arraignment until after questioning, which was a violation of Mass. R. Crim. P. 7(a)(1) which



states "[a] defendant who has been arrested shall be brought before a court if then in session, and if not, at its next session."

The Supreme Judicial Court in affirming the suppression of the defendant's statements, held that:

- a. "[a]n otherwise admissible statement is not to be excluded on the ground of unreasonable delay in arraignment, if the statement is made within six hours of the arrest (day or night), or if (at any time) the defendant made an informed and voluntary written or recorded waiver of his right to be arraigned without unreasonable delay."
- b. This rule will "(a) largely eliminate debate over the reasonableness of any delay, (b) bar admission of a statement made after the six-hour period unless there is a waiver of prompt arraignment, and (c) apply without regard to when either the court is in session or the arrest made."
- c. If, when arrested, "the person is incapacitated because of a self-induced disability, such as by the consumption of drugs, the six-hour period should commence only when the disability terminates. Also, if for reasons not attributable to the police, such as a natural disaster or emergency, interrogation during the six-hour period is not possible or must be suspended, the six-hour period should be tolled appropriately. It is most important to recognize that, but for the exceptions just noted, the period of safe harbor questioning commences on arrest and concludes six hours later without regard to when court is in session."

**Commonwealth v. Fortunato, 466 Mass. 500 (2013):** The Massachusetts Supreme Judicial Court, in affirming the six (6) hour rule set by Rosario, suppressed the statements made by a bank robber when made more than six (6) hours after the defendant's arrest and without the defendant waiving his right to prompt presentment.

**Commonwealth v. Powell, 468 Mass. 272, (2014):** Police arrested the defendant on the charge of larceny of a neighbor's vehicle. Although the police had probable cause to arrest the defendant for murder, they did not obtain an arrest warrant for that charge. While awaiting authorization from the district attorney's office, police placed the defendant in a cell at the station where he was held there for nine hours. The police interviewed the defendant for two hours. After providing a Miranda waiver at the beginning of the interview, the defendant began to talk about the motor vehicle larceny charge. During the interview, the officers were interested in discussing a murder that they believed the defendant had committed. During the course of the interrogation, the defendant confessed and two months later, he was indicted on charges of assault and battery by means of a dangerous weapon, unlawful possession of a firearm, armed assault with intent to murder, and murder in the first degree. The defendant moved to suppress the statements he made during the interview, alleging that the Miranda warnings given to him were defective, and that he had not promptly been brought before the court as required by Mass. R.Crim. P. 7(a)(1), as appearing in 461 Mass. 1501 (2012), such that the **Rosario rule** applied to exclude his statements. The defendant's motion was allowed because the **Rosario rule** applied where the defendant was not interrogated within six hours of his arrest, no exception applied to permit the delay, and the defendant had not signed a

waiver of his right to be brought promptly into court. The Commonwealth's field an interlocutory appeal and it was granted.

Two key issues were raised in the interlocutory appeal. The first issue was whether the **six hour rule** restarted with new charges and second whether the **emergency exception rule** allowed the police to delay bringing the defendant to Court. In response to the Commonwealth's arguments, the SJC found the following:

- a. The **Rosario** rule's six-hour safe harbor period did not restart when defendant was subsequently charged with murder, and
- b. an ongoing murder investigation did not constitute an emergency of the sort that would toll the six-hour period.

The Court reaffirmed the safe harbor rule that was established in **Rosario**. The Rosario rule provides that "statements made after the six-hour period following arrest are inadmissible, unless the defendant has waived the right to be promptly brought before the court or, in very rare circumstances, if an exception applies." **Id.** at 56-57. With respect to the Commonwealth's first argument, the Court found that the fact that the defendant had not yet been charged with murder does not serve to extend the safe harbor period here. Absent extraordinary circumstances, the six-hour safe harbor period under **Rosario** begins when a defendant is arrested. See **Commonwealth v. Morales**, 461 Mass. 765, 778 (2012).

The Court did not agree with the Commonwealth's assertion that the emergency exception rule should apply here and permit the defendant's confession. There was no indication that there was a public safety necessity for questioning the defendant about the ongoing and "rapidly unfolding" murder investigation while he was detained on the larceny charge. The facts here indicate that emergency was not attributable to the police. "[I]f for reasons not attributable to the police, such as a natural disaster or emergency, interrogation during the six-hour period is not possible or must be suspended, the six-hour period should be tolled appropriately." **Id.** Here, it was not impossible nor even impractical for the police to interrogate the defendant within six hours of arrest.

Since the defendant's statements were made **more than six hours** after his arrest and before his arraignment, and he did not waive his right to be promptly presented to the court, the motion to suppress his statements was properly granted in accordance with our interpretation of the **Rosario rule**.

### **Invocation of Right to Remain Silent**

#### **Post-Waiver of Right to Remain Silent Must be Scrupulously Honored**

**Commonwealth v. Smith**, 473 Mass. 798 (2016): The SJC concluded that a criminal defendant who initially had waived his Miranda rights met his burden to establish that he clearly stated his intent to cut off further questioning by the police when he said he was "done talking," where his choice of words fell within the range of cases in which this court has found a clear and unequivocal invocation of the right to remain silent, and therefore, a motion to suppress his statement subsequent to that invocation, on the ground that the police did not honor this invocation scrupulously, would have been successful.

***Commonwealth v. Adilson Neves***, SJC No. 11173, (2016): The defendant, Adilson Neves, was convicted of murder after shooting a taxi cab driver in Brockton. On appeal, the defendant argued that the statements he made to police at the station were made involuntarily and in violation of his Miranda rights. Police interviewed the defendant twice. During the first interview, the defendant admitted that his shoe was found near the crime scene but he denied any involvement in the shooting. In the second interview, the defendant told police he shot the taxicab driver.

### **1<sup>st</sup> Issue: Was the defendant's Miranda waiver valid?**

A valid Miranda waiver is one that is made knowingly, intelligently and voluntarily. ***Commonwealth v. Selby***, 420 Mass. 656 (1995). Courts examine the validity of a Miranda waiver by considering if there were any, "promises or other inducements, conduct of the defendant, the defendant's age, education, intelligence and emotional stability, experience with the criminal justice system, physical and mental condition, initiator of the discussion of a deal or leniency and the details of the interrogation, including recitation of the Miranda warnings. ***Commonwealth v. Mandile***, 397 Mass. 410 (1986). The defendant contends that he did not validly waive his Miranda rights due to his age and exposure to lead paint as a child. The SJC affirmed the motion judge's findings and found that the defendant validly waived his Miranda rights at both interviews. At each interview, the police read the defendant his Miranda rights and showed him a paper copy of those rights. Both times the defendant understood those rights and signed the waiver form. The defendant appeared confident during the interviews and confirmed that he was not under the influence of drugs or alcohol. Although he was only seventeen at the time, the SJC held that based on the totality of the circumstances, he validly waived his rights for each interview.

### **2<sup>nd</sup> Issue: Were the defendant's statements voluntary?**

In determining whether the defendant's statements were voluntary, courts examine the "totality of the circumstances surrounding the making of the statements to ensure that the defendant's will was not overborne." ***Commonwealth v. Hoose***, 467 Mass. 395 (2014). "Statements made after a valid waiver are considered voluntary if they are the product of a rational intellect and a free will." ***Commonwealth v. Davis***, 403 Mass. 575 (1988). The defendant contends that the police employed aggressive tactics during interview which rendered his statements involuntary. The police told the defendant untruthful statements about the surveillance footage they obtained along with his cell phone. While the, "use of such aggressive interrogation techniques is not preferred, it is just one factor to be considered in analyzing the totality of the circumstances. ***Commonwealth v. Tremblay***, 460 Mass. 199 (2011). While the SJC did not approve of the tactics the police employed, it did not find that the tactics overbore the defendant's will. Here the defendant was interviewed for two and half hours in the first interview and throughout the interview, the defendant told police he did not believe them. The SJC concluded that the statements made during the first interview were voluntary.

With regard to the second interview, the SJC found that the statements were initially voluntary. The police did not use coercive tactics during this interview. However, the SJC concluded that when the defendant invoked his right to remain silent, the police should have

honored his request. Because “the police failed to honor scrupulously the defendant’s repeated attempts to end questioning,” statements made during the second interview were deemed involuntary. “Even if a defendant initially invokes the right to remain silent, he or she may invoke that right at any point during questioning. **Commonwealth v. Clarke**, 461 Mass. 336 (2012). A police officer can ask for clarification if the defendant’s request to stop questioning is ambiguous but they must not disregard, “the long-standing principle that a postrequest responses to further interrogation may not be used to cast retrospective doubt on clarity of the initial requests itself.” **Commonwealth v. Santos**, 463 Mass. 273(2012).

The defendant requested multiple times that the police stop questioning him. He stated, “I don’t even feel like talking, man. I just, I just want to see my mom, dog.” Rather than seeking to clarify what the defendant meant by that statement, one of the officers instead encouraged him to keep talking by asking, “Did you tell your mom what happened?” After additional questioning the defendant made several requests to see his mother. The following exchange took place below:

Defendant: “I’m done, I’m done talking now.”

Interviewer: “Listen. I’m asking you a couple easy questions here.”

Defendant: “No, no, I’m straight. I’m straight.”

Interviewer: “You don’t want to talk to me anymore?”

Defendant: “I mean, I want to s — , if I could, if I could just see my mom. I just want to see my mom.”

After officers continued to question him, the defendant said, “no, no, no, no, I want to talk to my mom, dude,” and “I’m not gonna answer no questions until I talk to my mom.” Questioning continued after these statements. While the defendant’s initial request may not have been a clear invocation of his right to remain silent, the subsequent invocations of his right to silence were unambiguous and unequivocal. **Commonwealth v. Santana**, 465 Mass. 270 (2013). The SJC held that the police should have stopped questioning. The SJC affirmed the defendant’s convictions on other grounds raised in the appeal and held that the although statements made in the second interview should have been suppressed, their admission was harmless beyond a reasonable doubt.

### **Invocation of Right to Counsel**

**Commonwealth v. Thomas**, 469 Mass 531 (2014): In the early morning of July 6, 2006, the defendant, Chiteara M. Thomas, used a cigarette lighter to set fire to a curtain in the first-floor apartment of a three-story house in Brockton. The fire quickly spread from the first floor to the upstairs apartments. One of the residents in the third-floor apartment died in the fire, and several residents and guests in the second- and third-floor apartments were injured.

The police questioned Thomas on July 6, and 7, 2006, and arrested her during the interrogation on July 7, 2006. The video recordings of these interviews were admitted into evidence and played in their entirety at trial. Thomas filed a motion to suppress the

statements she made during the July 6th and July 7th interview. The descriptions of what happened during each interview are recounted.

***July 6th interview:***

Brockton Police requested that Thomas go to the police station to discuss the fire while she was attempting to clear up her warrant in court. Thomas voluntarily went with Brockton police. Thomas was not handcuffed, frisked or arrested. State Trooper John Sylva (hereinafter referred to as "Trooper Sylva") and Brockton police Detective Dominic Persampieri (hereinafter referred to as "Detective Persampieri") met Thomas in an interview room at the police station around 1:53 P.M. Thomas agreed to have her interview recorded and she was read her Miranda warnings. Thomas indicated that she understood her rights, but asked what would have happened if she did not want to talk the police. The police informed her she could leave and the following conversation ensued.

**TROOPER SYLVA:** "Before we proceed any further, I just want you to decide whether you want to speak with us regarding an incident."

**THOMAS:** "I'd rather have a lawyer, because ... I'm accused of starting a fire... major fire."

**TROOPER SYLVA:** "We didn't bring anything up to you."

**THOMAS:** "No, I'm bringing it up, 'cause I know what I'm here for.... And I know what I done, but ... I'm not a fire-starter. I did not do that, man."

**TROOPER SYLVA:** "So what you're saying to me is that you do not want to ... talk to us, is that correct?"

**THOMAS:** "I want to talk, but I don't wanna talk unless I got somebody present who...."

**DETECTIVE PERSAMPIERI:** "Do you want an attorney? Yes or no?"

**THOMAS:** "Yes."

**DETECTIVE PERSAMPIERI:** "Okay. End ... of conversation."

Detective Persampieri left the room and then reentered. Looking at the camera, Detective Persampieri asked, "Is that off?" Detective Persampieri looked down at Thomas and told her, "Understand one thing. Once you leave here, we're gonna do our investigation, and it's gonna get a lot hotter.... What we're trying to tell you, we're gonna give you the opportunity to tell us your side of the story. Okay?" The defendant said, "[T]hat's why I wanted to stay here," but, before leaving the room again, the detective interrupted her and said, "Sorry. You already lawyered up."

Trooper Sylva read Thomas her Miranda rights for a second time after she agreed to talk to police. Thomas signed the waiver form and she denied setting the fire, but made many

incriminating admissions regarding her whereabouts in the hours before and immediately after the fire, the details of her feud with Johnson (including her admission that she smashed the windows of the house), the intensity of her animosity toward Johnson, her tumultuous romantic relationship with Brown and her jealousy regarding his purported sexual infidelity, and her disappointment that he had not sided with her in the feud with Johnson. The interview continued until 4:40 P.M. When the interview ended, Trooper Sylva stated, "We gotta put you through the system. Thomas was held in custody at the police station overnight on the default warrant for the July 3rd trespass charge, but was released the next morning.

### **July 7th interview:**

Around 3 P.M., police told Thomas they wanted to speak with her again at the station. Thomas was "a little upset" and "annoyed" about returning to the station, but she was "compliant." Thomas waited nearly three hours at the station with officers by her side before she was interviewed again by Trooper Sylva and Detective Persampieri at approximately 6 P.M. There, Thomas was again given the Miranda warnings and again waived her rights. Booking began at 6:27 P.M. and another trooper was involved in the booking procedure. Thomas told him she wanted to speak with Trooper Sylva and Detective Persampieri again. During this second interview, Thomas admitted that she set the fire at the house and that she had no "intentions of it getting that big," and that she never meant to hurt anybody.

**Conclusion:** The SJC examined each interview separately and determined the following:

1. **July 6th** interview statements = should be suppressed because Thomas's invocation of the right to counsel was not honored and the interview should have ended.
2. **July 7th** pre-booking statements = should be suppressed because of a violation of the **Edwards rule**.
3. **July 7th** post booking statements = lawful.

### **1st Issue: July 6th Interview:**

The SJC compared this to **Commonwealth v. Novo**, 442 Mass. 262, 267, 812 N.E.2d 1169 (2004), where an interrogation technique in which the police told the defendant that this would be his "only opportunity" to offer an explanation as to why he hit the victim. In **Novo**, the police persisted in "this now-or-never theme," and went on to tell the defendant that, if he did not give them a reason for his conduct, "a jury were never going to hear a reason." **Id.** at 267-268. Although the detective did not expressly tell Thomas that, by having "lawyered up," she was losing her chance to tell her story to the jury, he communicated that she was losing her chance to tell her story to law enforcement officers which was unfair and misleading. "The SJC declared where a suspect has invoked her right to counsel and statements made afterwards are improper. There is nothing that would bar a suspect, after consulting with counsel, from deciding to speak with the police, and there is no sound reason why the police would refuse such a request."

## 2nd Issue: July 7th Pre-booking statements:

The SJC held that the July 7th pre-booking interview must be suppressed because it was conducted in violation of the **Edwards** rule. If it is determined that there was an **Edwards** violation at some point, police can still initiate another interview without taint. See **Maryland v. Shatzer**, 559 U.S. 98, 130 S.Ct. 1213, 175 L.Ed.2d 1045 (2010). In **Shatzer**, the defendant, who was in prison on an unrelated conviction, was questioned by police regarding a sexual abuse allegation. The defendant invoked his right to counsel, which ended the interview. Two and half years later, the police again interviewed the defendant in prison regarding these same allegations; this time, the defendant waived his Miranda rights and spoke with police without counsel being present. **Id.** at 101, 130 S.Ct. 1213.

The Supreme Court established in **Maryland v. Shatzer**, a **bright-line rule that, that when there is a custodial invocation of the right to counsel followed by a break in custody, the Edwards rule applies for a period of fourteen days from the break in custody.** **Id.** at 110, 130 S.Ct. 1213. The Supreme Court determined that a fourteen-day period would provide “plenty of time for the suspect to get re-acclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.” **Id.**

In the present case, the police initiated the pre-booking interview on July 7th, only one day after Thomas had invoked her right to counsel and on the afternoon of her release from custody that morning. Clearly, not enough time had passed and therefore the follow up interview violated the **Edwards** rule that was established in **Shatzer**.

## 3rd Issue: July 7th Post-booking statements:

The SJC concluded that the post-booking confession does not need to be suppressed because the defendant initiated the interview on her own volition. The defendant was free from any taint arising from either the July 6th or the July 7th **Edwards** violations. The SJC examined what the Supreme Court considered in **Oregon v. Bradshaw**, 462 U.S. 1039, 1045, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), where a defendant who had invoked his right to counsel initiated communication with the police when he asked a police officer what was going to happen to him. The majority of justices concluded that the defendant's question opened up the communication with the police through his question. The majority and dissenting justices agree that the initiation question is only “the first step of a two-step analysis,” and that, if the defendant is found to have initiated the post-invocation conversation, the police may re-interrogate only if the defendant also knowingly, intelligently, and voluntarily waives the right to counsel after receiving the Miranda warnings. **Id.** at 1044–1045, 1054 n. 2, 103 S.Ct. 2830. See **Edwards**, *supra* at 486 n. 9, 101 S.Ct. 1880.

The SJC stated that Massachusetts considers a violation of the **Edwards rule** a violation of Miranda and the only way to overcome that taint is two-fold.

1. There needs to be a break in the events from the first taint
2. There needs to be some analysis under the “cat-out-of-the-bag.”

The SJC found that the defendant's initiation of communication during her booking on July 7th was spontaneous and that she voluntarily told the booking officer she wanted to talk with the detectives again. Thomas' statements suggest that this was not part of a continued interrogation. Thomas' statements made during booking were made in a separate area from where the interrogation took place. Additionally, Detective Persampieri's statement to the defendant about "lawyering up" after she invoked her right to counsel qualified as coercive. The detective's statements suggest an intentional violation of the **Edwards** rule during the July 6th interview. Moments before Detective Persampieri restarted the interrogation, Thomas had invoked her right to counsel. Contrary to what happened on July 6th, the July 7th interview was not an intentional violation of the **Edwards** violation, but arose from the retroactive application of the **Shatzer** decision. The SJC concluded that Thomas' post-booking Miranda waiver was not the product of coercion or otherwise tainted by the earlier violations of *Miranda* and **Edwards**. The statements made by Thomas during the pre-booking interview of July 7th should have been suppressed, but that the statements she made during the post-booking interview were admissible.

### **Revisiting Juvenile Miranda**

***An interested adult must be present before police can question a juvenile under the age of 14. Although a juvenile between the ages of 14-18 can waive the presence of an interested adult during questioning, it is high burden to satisfy.***

#### **Interested Adult Requirements**

##### **A. Must be 18 years old**

A minor may not serve as the interested adult.

***Commonwealth v. Guyton, 405 Mass. 497, 502 (1989):*** The court ruled that the juvenile's seventeen-year-old sister, while an adult for purposes of the criminal law, was not an adult for purposes of the interested adult rule.<sup>2</sup>

##### **B. Cannot Be Incapacitated**

The interested adult cannot be under the influence of drugs and/or alcohol while advising the juvenile on whether or not to waive his/her *Miranda* Rights.

***Best Practice:*** Electronically record the reading of *Miranda* while specifically inquiring on the condition of the Juvenile and Interested Adult. (Drugs, alcohol, prescription medications, etc.)

##### **C. Act in the Best Interest of the Juvenile**

*The Interested Adult must be in a position to advocate for the juvenile and not be antagonistic.* In deciding whether the adult is considered an interested adult, "the facts must be viewed from the perspective of the officials conducting the interview." ***Commonwealth v. Berry, 410 Mass. 31, 37 (1991).*** Under the

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<sup>2</sup> On September 18, 2013, House Bill 1432 expanded the age of a juvenile to age eighteen. Therefore age seventeen is no longer considered an adult for purposes of criminal law.



objective standard the court determines whether it should have been reasonably apparent to the officials questioning a juvenile that the adult who was present on his or her behalf lacked capacity to appreciate the juvenile's situation and to give advice, or was actually antagonistic toward the juvenile, a finding would be warranted that the juvenile has not been assisted by an interested adult and did not have the opportunity for consultation contemplated by the rule. *Id.* at 36-37.

#### **D. Special Relationship**

The relationship between the Interested Adult and juvenile must be considered a "special relationship" acting in "loco parentis." The adult must be someone who "is sufficiently interested in the juvenile's welfare to afford the juvenile appropriate protection." ***Commonwealth v. Alfonso A.***, 438 Mass. 372, 383-384 (2003).

#### **E. Presence of Interested Adult**

**Under Age 14:** Actual presence of the juvenile's parent or interested adult is required in order to have a valid waiver of *Miranda* rights. ***Commonwealth v. MacNeil***, 399 Mass. 71 (1987).

**Ages 14 through 17:** Without the presence of a parent or interested adult, the *Commonwealth* must show that the juvenile has "unusual sophistication or knowledge" regarding his/her *Miranda* rights. ***Commonwealth v. Alfonso A.***, 53 Mass. App. Ct. 279 (2001).

#### **F. Consult with Interested Adult**

**Under 14 Years of Age:** The Commonwealth must prove that the juvenile and parent (interested adult) were given the actual opportunity for consultation, before waiving *Miranda*. The Commonwealth is not required to prove actual consultation occurred. ***Commonwealth v. Philip S.***, 414 Mass. 804, 811 (1993).

**Over 14 Years of Age:** The Commonwealth must prove that the juvenile was given a "genuine opportunity" to consult with an Interested Adult before waiving *Miranda*. The opportunity should be immediately and evidently available before the juvenile waives his or her *Miranda* rights. ***Commonwealth v. Alfonso A.***, 438 Mass. 372, 376-386 (2003).

#### **Interested Adult - Hindsight**

***Commonwealth v. Philip S.***, 414 Mass. 804, 810 (1993): The SJC stated that, "[w]e reject the notion that a parent who fails to tell a child not to speak to interviewing officials, who advises the child to tell the truth, or who fails to seek legal assistance immediately is a disinterested parent. Our interested adult rule, which we conclude was satisfied in this case, is not violated because a parent fails to provide what, in hindsight and from a legal perspective, might have been optimum advice."

#### **Interested Adult – Foster Parent**

***Commonwealth v. Escalera***, 70 Mass. App. Ct. 729 (2007): A fifteen-year-old juvenile and two (2) others were charged with burning a mosque in Springfield. Officers read the defendant his *Miranda* rights in the presence of his foster mother. Both the defendant and his foster mother signed the *Miranda* waiver and were allowed to consult privately before any questioning. The defendant subsequently made incriminating statements and was later found

delinquent. The defendant appealed claiming that his statement should have been suppressed because a foster parent cannot serve as an interested adult for the purposes of Miranda.

The Appeals Court held, "foster parents are neither agents of the police nor involved in the criminal process." Also, DSS (currently known as Department of Children and Families) "helps to support parents in need of assistance or, as is the case here, provides an adequate parental substitute. This substitute role is not in conflict with the duty of an interested adult." *Id.* at 732-733.

- ❖ **TRAINING TIP:** Compare a foster parent to an employee or agent of the Department of Youth Services ("DYS"). An employee of a private organization under contract with the DYS cannot serve as an interested adult because a DYS employee has "a duty to report to the police if he learned a juvenile committed a crime." See **Commonwealth v. A. Juvenile**, 402 Mass. 275, 277-280 (1988).

### ***Interested Adult – Must Understand Juvenile's Rights***

**Commonwealth v. Wade W.**, 81 Mass. App. Ct. 1131 (Unpublished) (2012): The Saugus police were investigating a bomb threat that had been written in the boys' bathroom at Saugus High School. Two officers spoke with the sixteen year old **juvenile**, in the presence of his **mother and stepfather**, at the Saugus police station. The interview was considered to be a "custodial interrogation." At the beginning of the interview, police read the juvenile his Miranda rights "one after another fairly rapidly, and without stopping between them." At the end, the juvenile was asked if he understood his rights, and then passed the form to the **juvenile's mother** and asked her to look at it. Police said more than once that both the **juvenile** and his **mother** could ask questions if they wished. The **juvenile's mother** looked briefly at the form and then handed it to her son, who signed it immediately without appearing to read it. Police then directed the **juvenile** to a place on the form saying, "[T]his next line just is the waiver; keeping these rights in mind that you still want to talk to us." The **juvenile** began to write and the following exchange took place between the mother and police:

**Mother:** "So he's not waiving his rights?"

**Detective Forni:** "I'm sorry?"

**Mother:** "Is that what he's doing? He's not waiving his rights?"

**Detective Forni:** "Well, no . . . ."

**Detective Donovan:** "He's just saying that he'll talk to us."

**Detective Forni:** "Yeah, that's what we say. If you would, just sign as a witness and then just put mother there."

The juvenile subsequently made various statements to police. The defendant filed a motion to suppress, which was denied and was later found delinquent for making the bomb threat and tagging.

On appeal, the Appeals Court held "[u]nder all of the circumstances here, we are persuaded that the Commonwealth did not meet its burden of proving beyond a reasonable doubt that the juvenile's waiver of his rights was knowing and intelligent, because it is not clear that his mother, the interested adult, in fact understood those rights."

## **Examining Interested Adult Requirements**

### ***A parent can still qualify as an interested adult even if they exhibit domineering conduct during an interview!***

***Commonwealth v. Quint, a juvenile***, 84 Mass. App. Ct., 507 (2013): The Court held that the juvenile's mother qualified as an interested adult and the juvenile's statements were made voluntarily and should not have been suppressed. The mother's "domineering conduct" during the police interview did not render the juvenile's statements involuntary nor did his mother's actions qualify her as disinterested adult. Here the Court determined that the mother's conduct was not coercive and her involvement suggested she had a genuine interest in the juvenile's welfare. The mother was not argumentative with the juvenile and she focused on "the descriptions of and time of the alleged break-in, and descriptions of the juvenile's friends." During the interview, the mother even asked the police to clarify the concept of joint venture for the juvenile, which is a further indication that she qualified as an "interested adult." It was evident throughout the interrogation, that there was no objective manifestation of animosity between the mother and the juvenile. See ***Commonwealth v. McCra***, 427 Mass. 569 (1998). Based on the mother's participation, the Court found the mother qualified as an "interested adult" and had sufficient mental capacity to advise the juvenile.

***Commonwealth v. Pacheco***, 87 Mass. App. Ct. 286, (2015): Taunton Police executed a search warrant for a home where a juvenile resided with his guardian because they suspected he was involved in a shooting. The juvenile was arrested when police discovered a handgun and several glassine bags containing a substance that appeared to be heroin in the juvenile's bedroom.

***Commonwealth v. Smith***, 471 Mass. 161, (2015): The Court held that the definition of term "juvenile" includes 17-year-olds in various contexts including criminal record information, appointment of counselors to juvenile offenders, and imposition of criminal assessments, but does not apply to the defendant, who was 17 years and five months old at time of arrest on suspicion of murder.

The defendant was questioned about the murder at the Brockton police station. At the time, police booked the defendant and read him his Miranda rights. The police also provided the defendant with a Miranda waiver form and they asked him to read it out loud. A detective assisted the defendant and he would pause after each line and ask whether the defendant understood. The defendant initialed each of the rights on the form as well as the word "YES" at the bottom of the form. He also agreed orally to waive his rights and to tell his side of the story.

The defendant was charged with murder. Before trial, he moved to suppress his statements to police. The defendant argued, among other things, that his Miranda waiver had not been valid because he did not have a meaningful opportunity to consult with an interested adult. The motion to suppress was denied and it was determined that the interested adult rule was not applicable because although, at seventeen years of age, the defendant was a "minor," he was not a "juvenile" subject to that rule. Based on the evidence presented, including a recording of the interviews with the defendant, the judge found that "the circumstances

surrounding the defendant's waiver of rights show, beyond a reasonable doubt, that it was voluntarily and intelligently made."

Several years after the defendant was convicted, the Legislature enacted St. 2013, c. 84 (2013 act), which expanded juvenile jurisdiction to include seventeen year olds. The defendant appealed his conviction and argued that the new law should apply to him.

The defendant argued that the passage of the 2013 act entitles him to the protection of the interested adult rule. The Court held that the 2013 act, which became law on September 18, 2013, "shall take effect upon its passage." St. 2013, c. 84, § 34. In **Watts v. Commonwealth**, 468 Mass. 49 (2014), the Court determined that the 2013 act applies prospectively only. Here the defendant was interviewed by police more than six years prior to the effective date of the 2013 act, and his motion to suppress was denied more than three years before that date. The propriety of the defendant's Miranda waiver and the admissibility of his statements are not affected by the passage of the 2013 act.

### ***Encouraging cooperation does not disqualify an Interested Adult***

**Commonwealth v. Tajerha, 86 Mass. App. Ct. 1110 (2014):** On October 22, 2008, in which the defendant (then sixteen years old) and four companions (two other juveniles and two adults), stole a cellular telephone and a bag of marijuana from two adult victims. As the defendant attempted to get away, one of the victims grabbed the defendant and put him in a headlock. To facilitate the defendant's release, one of the defendant's companions stabbed and seriously injured the victim.

Following the defendant's arrest, he agreed to speak with police after waiving his rights and conferring privately with his father, who remained with the defendant for the entire interview. The defendant later filed a motion to suppress his statements, claiming his Miranda waiver was invalid and his statements were involuntary because his father was not an appropriate "interested adult." The defendant contends that his father did not fill that role because he did not fully appreciate the consequences of letting the defendant speak with the police, and should not have encouraged the defendant to cooperate.

The court denied the defendant's motion and stated "[t]he argument misapprehends the role of the interested adult. A parent or other suitable adult does not fail to fulfil his or her role as an interested adult even if a lawyer may have given different advice, and even if the adult encourages the young suspect to tell the truth. Commonwealth v. Quint Q., 84 Mass. App. Ct. 507, 517, 998 N.E.2d 363 (2013). "To find that a juvenile has not been assisted by an interested adult 'it should have been reasonably apparent to the officials . . . that the adult who was present . . . lacked capacity to appreciate the juvenile's situation and to give advice, or was actually antagonistic toward the juvenile.'" Id. at 516, quoting from Commonwealth v. Philip S., 414 Mass. 804, 809, 611 N.E.2d 226 (1993). That is not the case here.

- ❖ **TRAINING TIP:** The SJC in Massachusetts has held that the voluntariness of a suspect's statements can be impacted when police tactics "used in combination, or use repeatedly throughout an interrogation or used together with implied promises of leniency or minimization of the consequences the suspect is facing." If police use a combination of tactics than it is more likely that the statements will be suppressed. The SJC has not established a bright line rule that can be applied to all circumstances but rather has to examine the "totality of the circumstances" as to whether the suspect's statements were involuntary because of police coercion. **Mincey v. Arizona**, 437 U.S. 385, 398-401 (1978); **Commonwealth v. Selby**, 420 Mass. 656, 663 (1999)

## **CASE REVIEW**

***Commonwealth v. Chism***, WL 924236 Mass Superior Court 2015: Philip Chism, a 14 year old student at Danvers High School, was reported missing by his mother in the early evening of October 22, 2013. At the same time, Colleen Ritzer, a teacher at Danvers High School, failed to return home after school. Shortly after midnight, Topsfield Police Officers discovered Chism walking along Route 1. After transporting Chism to the Topsfield police station, Topsfield police officers conducted a personal property inventory of Chism's belongings and discovered credit cards and a driver's license in the name of "Colleen Ritzer." At that time, the Topsfield police were not aware that Ms. Ritzer was also missing. Officers found a purse containing female underwear and a blood-stained box cutter. When asked "whose blood is this?", Chism replied "it's the girl's." Chism then made additional incriminating statements prior to being advised of his Miranda rights, which he waived.

Danvers police learned information linking Chism to the disappearance of Ms. Ritzer, which appeared to be caused by foul play. State police were dispatched to transport Chism to the Danvers police station from Topsfield. Chism's mother arrived at the Danvers station shortly after 1:30 a.m., prior to her son's arrival at the station, whereupon she was questioned by detectives who were focused upon locating the missing teacher. The motion judge found that the detectives advised Ms. Chism that she would be able to speak with her son, but they did not explicitly tell her that her role was to assist her son understand and decide whether to waive his Miranda rights. Police initially questioned Chism with his mother present in the interrogation room. During the recitation of the Miranda rights, Ms. Chism inquired if she could get an attorney that night and she explained that she believed it was important to have an attorney. She also stated that her son was despondent and that she did not know what was happening. Ms. Chism told her son that it would be better for him if he spoke with the police, to which Chism replied "no." Chism then asked whether he had to talk to the police with his mother in the room. When the mother offered to leave, Chism emphatically urged her to go. The mother signed the Miranda waiver form and departed. Chism later said in the interview that he disliked his mother and anybody else. Chism made highly incriminating statements that led police to the location of Ms. Ritzer's dead body on the Danvers High School grounds.

The defendant contended that the statements he made at the Topsfield police station should be suppressed because they were made while he was in custodial interrogation, and had not properly waived his Miranda rights.

### **1<sup>st</sup> Issue: Was Chism in custody at the Topsfield Police Department?**

There is no dispute that Chism was in protective custody at the Topsfield Police Department. However the court needed to determine whether the he was also in police custody, the court may consider "(1) the place of the interrogation; (2) whether the investigation has begun to focus on the suspect, including whether there is probable cause to arrest the suspect; (3) the nature of the interrogation, including whether the interview was aggressive or, instead, informal and influenced in its contours by the suspect; and (4) whether, at the time the incriminating statement was made, the suspect was free to end the interview by leaving the locus of the interrogation or by asking the interrogator to leave, as evidenced by whether the interview terminated with the defendant's arrest." ***Commonwealth***

**v. Bryant**, 390 Mass. 729, 737 (1984). See **Commonwealth v. Carnes**, 457 Mass. 812, 818–819 (2010).

Place of the Interrogation: The defendant's detainment at the Topsfield police station "does not, in itself" trigger custody. **Commonwealth v. Almonte**, 444 Mass. 511, 518 (2005). See **Commonwealth v. Lopes**, 455 Mass. 147, 163 (2009). Although the defendant was in the Topsfield police station, he was not handcuffed and he was seated on a bench in front of the small, but open, booking area. The officers gave the defendant food and blankets. Another significant factor the court considered was that the defendant could not see jail cells from where he was seated.

Focus of the Interrogation: *The Topsfield police brought the defendant to the station because they believe he was a missing juvenile, not because they suspected he was involved in his teacher's disappearance.* The police never relayed to the defendant that he was a suspect in any crime is a factor suggesting that he was not in custody. **Commonwealth v. Bly**, 448 Mass. 473, 492 (2007).

Nature of the Interrogation: The police questioned the defendant about the contents of his backpack in a *calm and non-aggressive tone*. Moreover, the defendant does not contend that the nature of the police officer's questioning was inappropriate or coercive.

Defendant's Ability to Leave: The defendant's ability to leave the Topsfield police station or otherwise end questioning weighs in favor of custody. Although the defendant was *not under arrest* at the Topsfield police station, as a recently found missing juvenile, he was in protective custody and *clearly not free to leave*.

After weighing the factors, the court concludes that the defendant was not in custody for purposes of Miranda and therefore Miranda warnings were not required. See *Bryant*, 390 Mass. at 737.

**2<sup>nd</sup> Issue: Did Chism validly waive his Miranda rights when questioned at the Danvers police station?**

The Court found that the defendant did not validly waive his Miranda rights based on his demeanor and behavior at the Danvers police station. At two separate points during the questioning at the police station, the defendant told Danvers police he did not want to talk them. Additionally, the defendant's mother requested an attorney on a number of occasions.

Another factor the court analyzed was the defendant's demeanor during the recitation of Miranda. The videotape shows that the defendant did not appear to be fully engaged as the officers explained his Miranda rights to him. It is clear that the defendant wanted to talk to the police without his mother present in the room and that he had no intention of talking while his mother was present in the room. The defendant was rude, dismissive and scornful of his mother and her desire to help him. At one point the defendant told his mother to leave. Because of the defendant's demeanor around his mother and the potential that he did not fully understand or appreciate the Miranda warnings, the Court was not convinced beyond a reasonable doubt that the defendant was paying attention to the Miranda warnings to the extent necessary to find that he understood and waived his Miranda rights beyond a reasonable doubt.

"Accordingly, the defendant's statements, while voluntarily made, must be suppressed because the court cannot find beyond a reasonable doubt that the defendant knowingly, intelligently and voluntarily waived his Miranda rights. The defendant's statements at the Danvers police station will not be available to the Commonwealth as evidence during its case in chief. If the Court had found the statements were made voluntarily beyond a reasonable doubt, the statements could be available to the Commonwealth for impeachment purposes, if the defendant testified at trial."

**3<sup>rd</sup> Issue: Did the defendant's mother qualify as an interested adult?**

The defendant's mother informed police that she was familiar with juveniles' rights from her prior employment with Child Protection Services. While the defendant's mother was at the Danvers police station, neither officer explicitly conveyed that her role was to consult with her son and assist him in understanding his Miranda rights. The defendant's mother wanted to assist her son and cooperate with police because she believed someone had been hurt. The videotape shows the defendant's mother was engaged and interested in her son's well-being especially when she asked to have an attorney present. The court found that the defendant's mother was an interested adult and was given a meaningful opportunity to consult with the defendant. Although the best practice would be to advise a parent of his/her role as interested adult, the defendant's mother in this case, appeared to understand her role and her son's constitutional rights. Although the defendant's mother qualified as an interested adult, she could not waive her son's right to Miranda. The court emphasized that there is no Massachusetts case law that explicitly or implicitly permits a parent or interested adult to invoke a juvenile's right to counsel on their behalf.

# Chapter 3

## CRIMINAL LAW DEVELOPMENTS

### **"An Act Relative to Protective Custody" Signed Into Law**

***Chapter 161 of the Acts of 2016 was enacted into law on July 25, 2016 and is effective immediately!***

**Chapter 111E** of the Massachusetts General Laws is amended by inserting **Section 9A** which is listed below. This bill adds a new section addressing persons who are incapacitated due to a substance other than alcohol.

Definition: Under the provision of the new statute, "incapacitated" now includes a person who has consumed a substance other than alcohol if, as a result of that substance, that person is any one of the following:

- a. Unconscious
- b. In need of medical attention
- c. Likely to suffer or cause physical harm or damage property
- d. Disorderly

Determination of Incapacitation: A police officer may ask a person to consent to reasonable tests that involve coordination, coherency of speech and breath to determine if the person is incapacitated. If the police officer determines that person is incapacitated based on observations or performance of the tests, the person can be placed in protective custody.

Protective Custody: Without a person's consent, a police officer can take a person into protective custody for immediate transport to an acute care hospital or satellite emergency facility or to obtain immediate emergency medical treatment.

- Minors in Protective Custody: If a police officer places an individual under the age of 18 in protective custody, parents or a guardian must be notified.
- Time of restraint: A person cannot be held in protective custody beyond the time required to complete the transport of the individual to an acute care hospital or satellite emergency facility or to obtain immediate emergency medical treatment. The legislation does not provide a time frame for how long may reasonably be taken for transportation or medical treatment.
- Use of Force: A police officer can use force that is reasonable for the officer to place person in protective custody. If there is safety risk to the incapacitated person, to the officer or other people who are present, a police officer can use reasonable force to place the person in protective custody. A police officer can search the person and the immediate areas surrounding the person and seize items or weapons that may pose a danger. All items shall be inventoried and returned to a person when they are no longer



"incapacitated." Items that are not legally possessed will not be returned to the person.

- **Documentation:** Any person who is placed in protective custody is not arrested. Police officers are required to document the date, time, place of custody, name of assisting officer and officer in charge. This information will not be collected for entry as a criminal arrest.

**Commentary:** If a subject has been revived using naloxone ("Narcan") and has regained consciousness, it may still be appropriate to place the subject into protective custody and transport that subject for medical attention, if the training and experience of the officer indicate that further medical attention is appropriate. In such a situation, the consent of the subject is not required, as the protective custody authority granted by the statute trumps the desire of the incapacitated subject. It may be advisable for departments to seek a written medical guidance regarding this type of situation, so that officers can apply a consistent policy.

## Comparison of Protective Custody Law Chart

	111B §8A	111E §9A
<b>Definition</b>	<p>"incapacitated person" = <b>alcohol</b></p> <p><b>Elements:</b>            (1) unconscious,            (2) in need of medical attention,            (3) likely to suffer or cause physical harm or damage property, or            (4) disorderly.</p>	<p>"incapacitated person" =</p> <p><b>controlled substance, toxic vapor or other non-alcohol substance</b></p> <p><b>Elements:</b>            SAME</p>
<b>Determination of Incapacitation:</b>	<p><b>Right to a Breathalyzer</b> - Any person assisted by a police officer to a police station shall have the right, and be informed in writing of said right, to request and be administered a breathalyzer test.</p> <p><b>Presumption of Intoxication</b> - Any person who has (.10) or more presumed intoxicated.</p> <p><b>Release Forthwith</b> - Any person who has (.05) or less and shall be released from custody forthwith and police may re-administer field sobriety tests or a reasonable test of coordination or speech coherency must be administered to determine if said person is intoxicated.</p>	<p>A police officer may ask a person to consent to reasonable tests that involve coordination, coherency of speech and breath to determine if the person is incapacitated. If the police officer determines that person is incapacitated based on observations <u>or</u> performance of the tests, the person can be placed in protective custody.</p>
<b>Role of Police Officer when taking a person into Protective Custody</b>	<p>Police officer may bring person to:</p> <p>a. residence,            b. police station <b>(will have to</b></p>	<p>Police officer may bring person to:</p> <p>a. acute care hospital            b. or satellite emergency facility</p>

	<p><b>notify facility)</b></p> <p>c. or treatment facility</p> <p>NOTE: If person is brought to police station: have option of</p> <p>a. breathalyzer</p> <p>b. right to make phone call</p>	c. seek immediate emergency medical treatment
<b>Minors</b>	Any person under age 18 requires police to notify parents or guardian	Same
<b>Time Restraints for Protective custody</b>	<p><b>No person shall be held more than 12 hours</b> - No person assisted to a police station shall be held in protective custody against his will; provided, however, that if suitable treatment at a facility is not available, an incapacitated person may be held in protective custody at a police station until he is no longer incapacitated or for a period of no longer than twelve hours or whatever is shorter.</p>	A person cannot be held in protective custody beyond the time required to complete the transport of the individual to an acute care hospital or satellite emergency facility or to obtain immediate emergency medical treatment. The legislation does not provide a time frame for how long transport would take to be completed or medical treatment sought.
<b>Use of Force</b>	Reasonable force	Reasonable force
<b>Search and Inventory Items</b>	Can conduct a search of person for weapons. Any items seized will be inventoried and returned if lawfully possessed	Can search person and immediate surroundings if incapacitated person is a danger to him/herself, the officer or other people present
<b>Data Collection</b>	<p>An entry of custody [Report Narrative] shall be made indicating</p> <ul style="list-style-type: none"> <li>the date, time, place of custody,</li> <li>the name of the assisting officer,</li> <li>the name of the officer in charge,</li> <li>whether the person held in custody <b><u>exercised his right to make a phone call,</u></b></li> <li>whether the person held in custody <b><u>exercised his right to take a breathalyzer test,</u></b></li> <li><b><u>and the results of the breathalyzer test if taken,</u></b></li> </ul>	Any person who is placed in protective custody is <u>not arrested</u> . Police officers are required to document the date, time, place of custody, name of assisting officer and officer in charge. This information will not be collected for entry as a criminal arrest.
<b>Status of Protective Custody</b>	Not an arrest	Not an arrest

***"An Act Relative to Protective Custody" Signed Into Law  
Chapter 161 of the Acts of 2016 was enacted into law on July 25, 2016 and is  
effective immediately!***

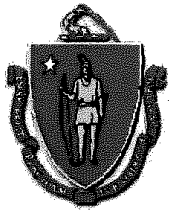
The expansion of the protective custody law now allows for transport to a facility for those who are incapacitated due to any substance excluding alcohol. Police may enforce the law if a person appears to be incapacitated or fails common cognitive and coordination testing that law enforcement agent's routinely administer when confronting these situations. While most cases are straight forward, the use of naloxone does create a unique situation in that the agent will neutralize the effects of the opioid by binding to the opioid and counteracting its adverse physical and cognitive effects. Medically therefore, a person who has received naloxone can present in a normal state and may wish to refuse transport to the hospital.

**ALL PERSONS RECEIVING NALOXONE BY LAW ENFORCEMENT AGENTS OR IN THE PRESENCE OF LAW ENFORCEMENT AGENTS SHOULD BE TRANSPORTED TO AN APPROPRIATE FACILITY PREFERABLY BY EMS. IN THE EVENT THAT THE PERSON WISHES TO REFUSE TRANSPORTATION, LAW ENFORCEMENT SHOULD PLACE THE PERSON UNDER PROTECTIVE CUSTODY.**

Transportation is medically mandated either voluntarily or under protective custody for the following reasons.

1. The effects of the naloxone may only be temporary. The uses of higher doses of opioids along with extremely potent forms of fentanyl have a potential for delayed relapses.
2. Secondary medical complications from the overdose may not immediately manifest themselves.
3. The use of naloxone causes withdrawals and makes the reuse of the opioid and the possibility of a fatal overdose highly possible.
4. A near fatal overdose is evidence that the person is "incapacitated" by the addiction and warrants at least the opportunity for a crisis evaluation that is now offered in all Massachusetts emergency departments.
5. Releasing the person is a potential public safety issue in that the person may attempt to drive a car, which could result in an accident with subsequent injuries and/or deaths.

*Daniel Muse*  
Dan Muse, MD  
MEDICAL ADVISOR  
MPTC



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CHARLES D. BAKER  
Governor

KARYN E. POLITO  
Lt. Governor

DANIEL BENNETT  
Secretary

August 18, 2016

Chief  
Police Headquarters  
Address  
City, MA 01234

**Re: H.4490 *An Act relative to protective custody***

Dear Chief:

I am writing to you regarding the passage of H. 4490, *An act relative to protective custody*, that was signed into law by Governor Baker on July 22, 2016. The bill creates a new provision of the protective custody law, G.L. c. 111E, § 9A, that grants expanded authority to Massachusetts police officers to act to protect vulnerable citizens. The Executive Office of Public Safety and Security ("EOPSS") has reviewed the new law, and I am writing to make sure that the law enforcement officers who will be asked to apply the new law understand its purpose and effect.

The new provisions provide Massachusetts police officers – but no one else - with the authority to place into protective custody a person who is "incapacitated" by the consumption of any drug, vapor, or other intoxicating substance, whether or not that substance is a traditional controlled substance regulated by G.L. c. 94C. The provision roughly parallels G. L. c. 111B, § 8, which has long authorized protective custody for persons incapacitated due to consumption of alcohol.

The new law includes two special requirements that police officers must follow when they place into protective custody an individual incapacitated due to consumption of a substance other than alcohol:

- The police officer must immediately get the individual emergency medical treatment, either at a hospital or through other emergency medical services.
- Whenever a person under the age of 18 who is incapacitated is placed into protective custody, the police officer must immediately notify a parent or guardian.

EOPSS has received inquiries as to how this new law applies after someone has been administered naloxone ("Narcan"). Please note that while the statute's definition of "incapacitated" encompasses individuals who are unconscious as a result of overdose, it also includes individuals who are conscious, but who, as a result of their consumption of a non-alcohol substance, are i) in need of medical attention, ii) likely to suffer or cause physical harm or damage property; or iii) disorderly. Accordingly, even if the subject becomes conscious as a result of

the administration of naloxone, there are alternative bases under which an officer would be authorized to determine that protective custody is appropriate. If, based on the training and experience of the officer and the observations made of the situation, the subject remains "in need of [further] medical attention" and/or "likely to suffer . . . physical harm," the officer can take the subject into protective custody over her objection, even if she is otherwise well-behaved and not disorderly.

Put another way, the application of naloxone can reverse *unconsciousness* without necessarily reversing "*incapacitation*" for purposes of the new protective custody statute. EOPSS, in consultation with emergency medicine and opioid treatment experts, is recommending that departments obtain written guidance about post-revival vulnerability from their department's physician advisor.

Though there is still much work to be done in our Commonwealth's struggle with drug addiction, the administration welcomes this tool that allows law enforcement to provide temporary protective custody and facilitate emergency medical treatment to those incapacitated by substance abuse.

Enclosed with this letter is a copy of the signed parchment which includes the complete language of the law.

Sincerely,

A handwritten signature in cursive script that reads "Daniel Bennett". The signature is written in dark ink and is positioned above the typed name and title.

Daniel Bennett, Secretary  
Executive Office of Public Safety and Security

## **Preservation of Evidence**

***The Appeals Court holds that if police have video of an alleged crime, the Commonwealth has an obligation to preserve it!***

***Commonwealth v. Heath***, 89 Mass. App. Ct. 328 (2016): On May 29, 2013, Haverhill police Officer Dennis Moriarty, who was called to the hospital, tried to calm the defendant, Carroll Heath. Officer Moriarty escorted the defendant out of the hospital while the defendant verbally threatened to hack him to pieces with a machete. The defendant then proceeded to a neighboring property, and Officer Moriarty responded and arrested the defendant.

During booking, Officer Moriarty requested that the defendant remove articles of clothing, the defendant refused and forcefully struck Officer Moriarty in the chest. Officer Moriarty did not require medical attention after the encounter. The defendant denied assaulting Officer Moriarty and claimed the officer assaulted him. The Haverhill police department has security cameras that record the entire booking process. Defense counsel filed a motion to preserve the recording but his request was made more than 30 days after the incident and the system had already self-purged. The case went to trial and the defendant requested that the judge give an instruction regarding the lost videotape evidence. The judge did not give the instruction and the defendant was convicted. The defendant filed a motion for new trial, contending that he was denied due process of law by the Commonwealth's failure to preserve the booking video. The motion was denied and the defendant appealed.

**Conclusion:** The Appeals Court reversed the defendant's convictions and found that the Commonwealth was negligent when it failed to preserve the videotape.

Here the Appeals Court held that where the police department had a video recording of an alleged crime committed in its booking area, with which the defendant was charged, the Commonwealth should have immediately recognized the need to preserve the video and should have done so without a court order. The Appeals Court concluded that the Commonwealth was negligent in not preserving the evidence. See ***Commonwealth v. Cameron***, 25 Mass. App. Ct. at 548. "Negligence or inadvertence are less culpable than bad faith, but they are nevertheless culpable and must be accounted for in the balancing procedure." ***Commonwealth v. Olszewski***, 401 Mass. 749, 757 n.7 (1988), S.C., 416 Mass. 707 (1993), cert. denied, 513 U.S. 835 (1994).

## **Animal Cruelty**

- ❖ **TRAINING TIP:** Below is a quick review of the elements of the animal cruelty statute under G. L. c. 140, § 174E(f). The Appeals Court in the ***Trefry*** case clarified the requirements of the statute.

**Elements:** "No person owning or keeping a dog shall subject the dog to cruel conditions or inhumane chaining or the tethering at any time. For the purposes of this subsection, 'cruel conditions and inhumane chaining or tethering' shall include, but not be limited to, the following conditions:

1. filthy and dirty confinement conditions including, but not limited to, exposure to excessive animal waste, garbage, dirty water, noxious odors, dangerous objects that

could injure or kill a dog upon contact or other circumstances that could cause harm to a dog's physical or emotional health;

2. taunting, prodding, hitting, harassing, threatening or otherwise harming a tethered or confined dog; and
3. subjecting a dog to dangerous conditions, including attacks by other animals.

***Cruelty includes inhuman inhumane conditions.***

***Commonwealth v. Trefry***, 89 Mass App. Ct. 568 (2016): The defendant, Leanne Trefry, was convicted of two counts of violating a 2012 statute, G. L. c. 140, § 174E(f), which protects dogs from cruel conditions and inhumane chaining or tethering. The defendant appealed arguing that this statute did not apply because her dogs were not confined to the outside and she further contends that the SJC affirmed this interpretation. See ***Commonwealth v. Duncan***, 467 Mass. 746, 752, (2014).

The Court did not agree with the defendant's argument and concluded that pursuant G. L. c. 140, § 174E, subjecting a dog to cruel conditions is sufficient to establish a violation, and the dog does not have to be subject to either outside confinement to satisfy a required element under the statute. The Court further stated that ***Duncan*** did not establish that dogs had to be confined to those yards in order to trigger the statute's protection, nor would it be sensible to impose such a requirement where the safety of dogs is imperiled even by an ill-equipped yard to which they have access but in which they are not confined. Here while the dogs could move in and out of the condemned house by means of a broken latch on the back door, the dogs were in fact confined to the defendant's house and fenced-in yard. There was overwhelming evidence that the area to which the dogs were confined presented with every factor listed in § 174E(f)(1) as constituting "filthy and dirty" conditions.

***Shooting dog with a pellet gun qualifies as animal cruelty.***

***Commonwealth v. Stanley Szewczyk***, 89 Mass. App. Ct. 711 (2015): The defendant, Stanley Szewczyk was charged with animal cruelty after shooting his neighbor's dog with a pellet gun. The defendant filed an appeal after he was convicted of animal cruelty. The defendant argues that he "pursued a lawful purpose and his intent was justifiable," in shooting the dog with a pellet gun. According to the defendant, "his actions do not qualify as cruelty under the G. L. c. 272, § 22 because he was trying to scare the dog off his property for the safety of his wife who had a medical condition. Shooting the dog in the rump once with a pellet gun from a distance of about 50 feet was intended for a lawful and justifiable purpose and fails to qualify as cruelty under G. L. c. 272, § 77.

**Conclusion:** The Court held that the animal cruelty statute does not require that the defendant specifically intended to cause harm to the animal. Whether the defendant intended only to "sting" the dog in order to discourage its return to the defendant's property is immaterial. See ***Commonwealth v. Erickson***, 74 Mass. App. Ct. 172, 177 (2009) (necessary that the defendant "intended the act to occur which constitutes the offense"). Shooting the dog and having the pellet lodge in her hind leg, deep into the muscle and close to the bone, unnecessarily, and unjustifiable. The pellet caused severe pain, prevented the dog from

walking for a week and required confinement to the house for months until the dog fully recuperated. Unfortunately, the dog still has a limp as a consequence of the defendant's admitted actions. Based on these facts, the Court affirmed the animal cruelty convictions and concluded that the defendant "intentionally and knowingly did acts which were plainly of a nature to inflict unnecessary pain, and so were unnecessarily cruel." ***Commonwealth v. Zalesky***, 74 Mass. App. Ct. 908, 909 (2009).

### **An Act Preventing Animal Suffering and Death**

**Chapter 248 of the Acts of 2016:** On August 19, 2016 Governor Baker signed into law **S. 2369, An Act Preventing Animal Suffering and Death**. The bill restricts tethering an animal for certain periods of time or if there are weather concerns. Additionally, it authorizes law enforcement to enter a motor vehicle if an animal is locked inside the vehicle and subject to dangerous conditions.

#### **Amendments to G.L. c. 140, § 174E:**

- ❖ Length of Time Restricted for Tethering: "Prohibits any animal being tethered to a stationary object including a dog house, pole or tree for longer than 5 hours within a 24 hour period and outside from 10 PM to 6AM unless the tethering is for not more than 15 minutes and the dog is not left unattended by the owner, guardian or keeper."
- ❖ Restrictions on leaving a dog outside with weather conditions: A dog cannot be left outside when a weather advisory, warning or watch is issued by a local, state or federal authority or when outside environmental conditions including, but not limited to, extreme heat, cold, wind, rain, snow or hail, pose an adverse risk to the health or safety of the dog based on the dog's breed, age or physical condition, unless the tethering is for not more than 15 minutes.

Exception: An exception to a restriction on outdoor confinement under this section that is reasonably necessary for the safety of a dog shall be made for a dog that is:

- (i) present in a camping or recreational area pursuant to the policy of the camping or recreational area; or
- (ii) actively engaged in conduct that is directly related to the business of shepherding or herding cattle or other livestock or engaged in conduct that is directly related to the business of cultivating agricultural products.

**PENALTIES:** 1<sup>st</sup> offense: \$50; 2<sup>nd</sup> offense: \$200; 3<sup>rd</sup> or sub. offense: \$500.

A special police officer appointed by the colonel of the state police at the request of the Massachusetts Society for the Prevention of Cruelty to Animals and the Animal Rescue League of Boston under G.L. c. 22C § 57 may enforce this section following the same procedures relating to notice and court procedure in G.L. c. 40 §21D for the non-criminal disposition of a violation, if an animal control officer contacted by either of these agencies in response to a violation of this section is unresponsive or unavailable.



**New Section: G.L. c. 140, § 174F:**

- ❖ Confinement within a motor vehicle: A person shall not confine an animal in a motor vehicle in a manner that could reasonably be expected to threaten the health of the animal due to exposure to extreme heat or cold.
- ❖ Authority of animal control officer, law enforcement or fire fighters: If an animal is left in a motor vehicle and the owner cannot be located, an animal control officer, law enforcement officer or fire fighter may enter a motor vehicle by any reasonable means to protect the health and safety of an animal. An animal control officer, law enforcement officer or fire fighter may enter the motor vehicle for the sole purpose of assisting the animal and may not search the vehicle or seize items found in the vehicle unless otherwise permitted by law.

**NOTE:** There is no criminal or civil liability for animal control officer, law enforcement or firefighter that enters the vehicle for the above purpose.

- ❖ Procedure After Entry: An animal control officer, law enforcement officer or fire fighter who removes or otherwise retrieves an animal shall leave written notice in a secure and conspicuous location on or in the motor vehicle bearing the officer's or fire fighter's name and title and the address of the location where the animal may be retrieved.
- ❖ Retrieval of Animal: The owner can only retrieve the animal after payment of all charges that have accrued for the maintenance, care, medical treatment and impoundment of the animal.
- ❖ Rights of Citizens: If citizen cannot locate owner of motor vehicle, they can only enter a motor vehicle to assist the animal if:
  - i. They notified law enforcement or called 911 before entering the vehicle;
  - ii. The motor vehicle is locked or there is no other reasonable means for exit and the person uses not more force than reasonably necessary to enter the motor vehicle and remove the animal;
  - iii. There is a good faith and reasonable belief, based upon known circumstances, that entry into the vehicle is reasonably necessary to prevent imminent danger or harm to the animal; and
  - iv. They must remain with the animal in a safe location in reasonable proximity to the vehicle until law enforcement or another first responder arrives.

**NOTE:** There is no criminal or civil liability for a person that enters the vehicle for the purposes listed above.

**PENALTY:** Civil infraction punishable by a fine of not more than \$150 for a 1<sup>st</sup> offense, \$300 for 2<sup>nd</sup> offense and \$500 for a 3<sup>rd</sup> or subsequent offense. There is nothing that precludes prosecution under G.L. c. 272, § 77.

### ***III. Domestic Violence & Sexual Assault Offenses***

#### **Parental Privilege**

***The SJC holds that under the parental privilege parents can use force to discipline their children as long as it is reasonable.***

***Commonwealth v. Dorvil***, 472 Mass. 1 (2015): The SJC concluded that any “parent or guardian may not be subjected to criminal liability for the use of force against a minor child under the care and supervision of the parent or guardian, provided that (1) the force used against the minor child is reasonable; (2) the force is reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of the minor's misconduct; and (3) the force used neither causes, nor creates a substantial risk of causing, physical harm (beyond fleeting pain or minor, transient marks), gross degradation, or severe mental distress.”

While the balance established with this parental privilege may not be perfect but “to the extent that that is so, the balance will tip in favor of the protection of children from abuse inflicted in the guise of discipline.” Otherwise put, the parental privilege defense must strike a balance between protecting children from punishment that is excessive in nature, while at the same time permitting parents to use limited physical force in disciplining their children without incurring criminal sanction.

Since there was no evidence that Dorvil’s “smack” resulted in any injury to the child, or that Dorvil’s use of force was unreasonable, the SJC reversed the convictions and found that the use of force reasonably related to a permissible parental purpose.

***The Appeals Court holds that parental privilege can extend to stepparents acting in “loco parentis.”***

***Commonwealth v. Christine Packer***, 88 Mass. App. Ct. 585 (2015): The defendant, Christine Packer was married to the victim’s father. The victim’s biological mother was never married to her father and there was no evidence that she was involved in her life. The victim considered the defendant her mother and referred to her as “mom,” even though they had had volatile relationship. On March 30, 2011, the defendant struck the victim’s right ear with her hand after she learned that victim had eaten some cheese from the refrigerator. The defendant relayed the incident to the victim’s father, who punched the victim in the face.

Later that day, the victim reported the incident to her ninth grade adjustment counselor at a regularly scheduled meeting. The counselor did not notice any physical marks on the victim when she first arrived. However, after the victim reported the incident, the counselor carefully examined the victim’s head and was able to observe a swollen lip and cut gum (in the area where the father allegedly “punched” her), and a “red like scratch mark” on the victim’s right ear (where the defendant allegedly struck her). An investigation and these charges ensued.

The defendant and the victim’s father were charged with assault and battery of the fourteen year-old victim. There was a joint trial, during which both parties requested a jury instruction on the affirmative defense of parental discipline. The judge gave the instruction with regards to the father, but not with regards to the defendant because the trial judge found the defendant had not sufficiently demonstrated that she was acting in “loco parentis.”

The father was acquitted and the defendant was convicted. The defendant appealed and argued that the parental privilege should extend to her because she was acting in "loco parentis."

**Conclusion:** The Appeals Court held that the parental privilege established in ***Commonwealth v. Dorvil***, 472 Mass. 1 (2015), can be applied to a person acting in "loco parentis."

Previously, the SJC held in ***Dorvil*** that parents can use reasonable force to discipline a minor child under the common-law parental privilege. The SJC did establish some parameters surrounding the parental privilege:

- (1) the force used against the minor child is reasonable;
- (2) the force is reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of the minor's misconduct; and
- (3) the force used neither causes, nor creates a substantial risk of causing, physical harm (beyond fleeting pain or minor, transient marks), gross degradation, or severe mental distress."

In the present case, the Appeals Court considered the defendant's relationship with the victim and whether she was acting in "loco parentis" even though the victim's biological father lived in the same house. According to the victim's testimony, the defendant served "a robust role in the family" and she considered the defendant her mom. There was no evidence that the victim's biological mother was involved in her life at all. Based on the facts in this case, the Court found there was sufficient evidence to establish that the defendant was acting in "loco parentis," and should have been allowed to use the parental privilege as an affirmative defense.

The Court also did not adopt a general presumption that stepparents act in loco parentis with regard to their spouses' children. "The mere fact that one is married to a legal parent obviously may say little about the nature and extent of the particular parenting role that he or she plays, and that role presumably will vary from household to household." See ***Commonwealth v. O'Connor***, 407 Mass. at 668 ("an in loco parentis relationship does not arise merely because someone in a position of stepparent has taken a child into his or her home and cares for the child"). Additionally, the Court also did not preclude stepparents from playing a "loco parentis" role just because one of the children's legal parents also resides in the same household.

### **Reckless Endangerment**

**Mass. Gen. Laws ch. 265, § 13L:** Whoever wantonly or recklessly engages in conduct that creates a substantial risk of serious bodily injury or sexual abuse to a child or wantonly or recklessly fails to take reasonable steps to alleviate such risk where there is a duty to act shall be punished by imprisonment in the house of correction for not more than 2½ years.

The statutes further states, wanton or reckless behavior occurs when a person is aware of and consciously disregards a substantial and unjustifiable risk that his acts, or omissions where there is a duty to act, would result in serious bodily injury or sexual abuse to a child. The risk must be of such nature and degree that disregard of the risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

**Failure to take reasonable steps to alleviate the risk where there is a duty to act**

**Commonwealth v. Figueroa**, 83 Mass. App. 251 (2013): A six-month-old child, his 15-year-old mother, and his father lived with defendant, the child's grandmother. The father dropped the child from above the father's head to a tile floor, and the child struck his head and suffered a complex skull fracture. Defendant refused to take the mother and the child to the hospital, and confiscated the mother's cell phone to prevent her from summoning an ambulance. The defendant was convicted of reckless endangerment of a child and appealed.

The Appeals Court held that the evidence supported the defendant's conviction for reckless endangerment of a child where:

- (1) the child's father dropped the child from above the father's head to a tile floor and the child struck his head on the floor, suffering a complex skull fracture;
- (2) a doctor testified that left untreated, the child's injuries created a substantial risk of death;
- (3) the defendant, the child's grandmother, refused to take the child's 15-year-old mother to the hospital with the child, and confiscated the mother's cell phone to prevent her from being able to summon an ambulance;
- (4) defendant's responsibility for the mother included helping the mother obtain medical care for her injured infant; and
- (5) the defendant affirmatively prevented the child from being treated immediately.

G.L. c. 265, § 13L only requires proof that a delay or blocking of medical care created a risk. The court held that the defendant had a duty to act and delaying or obstructing medical care for the child created a substantial and unjustifiable risk of serious bodily injury.

**Commonwealth v. Labrie**, 473 Mass. 665 (2016): The defendant, Kristin LaBrie, was charged and convicted of attempted murder, assault and battery and child endangerment after she failed to give her son chemotherapy and other medications designed to treat his cancer. The defendant's son died after his cancer returned. The defendant appealed her convictions and argued that the charge of assault and battery upon a child, in violation of G. L. c. 265, § 13J (b), and assault and battery upon a person with a disability, in violation of G. L. c. 265, § 13K (e), punishes a caretaker of a child who "wantonly or recklessly permits substantial bodily injury" cannot stand because the Commonwealth failed to present evidence sufficient to prove "substantial bodily injury."

During the trial, the Commonwealth argued that the defendant's withholding medications from her son caused his cancer to return a more "virulent and treatment-resistant form," and that this potent illness qualified as "bodily injury," pursuant to G. L. c. 265§ 13J (b). However, the Court found that while not the defendant failed to give her son the full treatment of medication, ten to fifteen percent of children succumb to cancer. The Commonwealth could not prove beyond a reasonable doubt that the defendant's actions actually caused the more treatment-resistant form of cancer to occur. Furthermore the Court did not find that the death of the defendant's son qualified as "bodily injury" or "serious bodily injury," See *Commonwealth v. Chapman*, 433 Mass. at 484, nor does it increase the risk of death. Based on the Court's findings the assault and battery convictions under §§ 13J (b) and 13K (e), were vacated. However, the defendant's conviction for reckless endangerment of a child in violation of G. L. c. 265, § 13L is affirmed. Here the defendant wantonly or recklessly failed to take reasonable steps to alleviate a risk of bodily injury by not giving her son the required medications for his cancer treatment.

### **Proof of the defendant's subjective state of mind**

***Commonwealth v. Coggeshall***, 473 Mass. 665 (2016): Halifax police officers were sent to investigate a report of two individuals walking on the Massachusetts Bay Transportation Authority (MBTA) train tracks. They saw the defendant and his eleven year old son walking along the train tracks. The MBTA was notified, and it slowed the scheduled train to allow the police time to get the defendant and his son off the tracks. The defendant was holding his son's hand for balance. The boy was carrying two plastic bags containing personal effects. The boy made several efforts to keep his father from falling, but at one point the defendant fell on his back and landed between the tracks. The officers noted that the defendant was visibly intoxicated. A heavy odor of alcohol was detected on his breath. When asked why they were on the tracks, the defendant said that he always walks on the tracks, and that he was "fucked up." He also said he had had a few beers. The officers escorted the defendant and his son off the tracks. At no time did the defendant display an ability to walk on his own. The defendant was subsequently charged with trespassing and reckless endangerment of a child.

The defendant filed a pretrial motion to dismiss the count charging him with reckless endangerment. A judge in the District Court ruled that the Commonwealth was required to establish that the defendant actually was aware of the substantial risk of serious bodily injury to which he exposed his child, and that the evidence offered in support of the application for the criminal complaint failed to demonstrate probable cause to believe that the defendant, who was heavily intoxicated at the relevant time, had the mental state required to support the charge. The judge dismissed the count of reckless endangerment and the Commonwealth appealed.

On appeal, the SJC noted that Section 13L differs from the common-law meaning of "wanton or reckless." Section 13L is a crime created by the Legislature, and although the Legislature used the words "wanton or reckless," it expressly limited such conduct to circumstances where an accused "is aware of and consciously disregards" the risk. G. L. c. 265, § 13L. In these circumstances we ascertain a clearly expressed legislative intent to depart from the common-law meaning of the words "wanton or reckless." See *Commonwealth v. Burke*, 392 Mass. 688, 690, 467 N.E.2d 846 (1984), quoting *Commonwealth v. Knapp*, 26 Mass. 496, 9 Pick. 496, 514 (1830). The judge below correctly recognized that § 13L requires

proof of the defendant's subjective state of mind with respect to the risk involved. That is, he must be shown to have been actually aware of the risk. Unlike the common-law meaning of "wanton or reckless," the Commonwealth does not have the option of proving a defendant's objective or subjective state of mind. **Id.** at 670.

The Commonwealth argues that the evidence was sufficient to establish probable cause to believe that the defendant actually was aware of the risk. It contends that the defendant's statement that he "always walked on the tracks" is evidence that he knew where he was, that he knew he was with his son because they were holding hands, and that he knew the youth was under age eighteen because the youth was his son. Moreover, the defendant's statement that he was "fucked up" and had consumed a few beers is evidence that he was aware of his own condition and the cause of that condition. From this evidence, as well as the defendant's stated familiarity with railroad tracks and the common knowledge that railroad tracks are dangerous places to be walking, the Commonwealth contends that this evidence establishes probable cause that the defendant "wantonly or recklessly" engaged in conduct that created a substantial risk of serious bodily injury to his eleven year old son within the meaning of § 13L. Specifically, the Commonwealth contends that there is probable cause to believe that the defendant was "aware of and consciously disregard[ed] a substantial and unjustifiable risk that his acts ... would result in serious bodily injury ... to a child." G. L. c. 265, § 13L. We agree. **Id.** at 671.

**E.C.O. v. Compton**, 464 Mass. 558 (2013): The SJC vacated the District Court's order because there was no evidence of abuse even though Compton and the daughter were in a "substantive dating relationship." **ECO v. Compton** is significant because it expanded what is considered a "substantive dating relationship," to include relationships that develop from various forms of technology and consist largely of electronic communications. Even if a relationship develops or progresses through electronic communications, a level of intimacy can exist and be sufficient to establish a "substantive dating relationship." For the purposes of Chapter 209A Orders "substantive dating relationship" includes relationships conducted electronically.

### **Civil Harassment Orders**

**F.A.P. v. J.E.S.**: 87 Mass. App. Ct., 595, (2015): An eleven year old boy raped a 7 year old girl. As a result of the incident, a juvenile judge issued a temporary harassment order against the eleven year old juvenile. The order was extended for a year and based on the allegations that the defendant digitally raped her. The juvenile appealed arguing that there was not enough evidence to prove harassment. The judge in the harassment proceeding determined that since the defendant did not instill fear to the victim, the harassment order could not issue. The issue was appealed to the Massachusetts Appeals Court who held that there was sufficient evidence of harassment to support the judge's order, but that the judge applied an incorrect view of the law.

The Appeals Court examined two definitions of harassment that would merit issuing a 258 (e) order. The first definition of G. L. c. 258E, § 3, does not apply to the facts of this case, but defines "harassment as three (3) or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property." G. L.

c. 258E, § 1, inserted by St. 2010, c. 23 (definition of “harassment,” subsection [i]). See generally **Seney v. Morhy**, 467 Mass. 58, 63 (2014).

The second definition of “harassment” applies to what had occurred here and involves, a defendant allegedly committing one or more acts of sexual misconduct. G. L. c. 258E, § 1 (definition of “harassment,” subsection [ii]). Under this definition, a harassment prevention order can issue in two different ways:

1. Harassment order can issue if the defendant “by force, threat or duress caused the plaintiff to involuntarily engage in sexual relations,” or
2. Harassment order can issue if the defendant committed any of twelve specifically enumerated sex crimes, including — as relevant here — rape of a child, G. L. c. 265, § 22A. If the defendant digitally raped the plaintiff, this would constitute a violation of G. L. c. 265, § 22A, and would qualify as “harassment.” It would be unnecessary to prove that the defendant intended to cause fear.

The Appeals Court also found that the judge erred because she determined that since there was no indication the defendant caused fear to the victim, a harassment order could not issue. However, pursuant to G. L. c. 265, § 22A, a harassment order can issue as long as there is an allegation of one the enumerated sex crimes that was included in the statute. In this case, the judge did not consider whether the defendant actually raped the victim and if that had been shown, a harassment order would have issued under the second definition. Based on the evidence, there was sufficient proof that a 7 year old girl suffered a labial tear directly after having been alone with a defendant who had previously engaged in an indecent touching of her. There was sufficient evidence to support a finding that the defendant raped the plaintiff.

### **Harassment Orders (Criminal/Civil orders)**

**A.T. v. C.R.** 88 Mass. App. Ct. 532 (2015): The Court affirmed the extension of a civil harassment order against the eleven year old defendant. The Court found that the defendant committed three or more acts of willful and malicious conduct aimed at the plaintiff with intent to cause fear, intimidation, abuse or damage to property and that it did. Here, the plaintiff proved by a preponderance of the evidence that the defendant harassed her when he made a sexual comment during a Face time video chat, threatened to make the plaintiff’s life a living hell if she showed the video to anyone and third when he threatened to punch her in the breasts.

**1<sup>st</sup> Issue:** The Court stated that “if the first incident, the FaceTime video with the sexually explicit comment, had been an isolated one, and if it had occurred in a private conversation between the parties, it is unlikely that it would be seen as an act of harassment. However, given that the comment was made in the presence of a classmate, who was videotaping the conversation, it becomes something very different — a humiliating and intimidating moment, capable of repetition on social media indefinitely, and part of a larger pattern of harassment that continued in the following days.”

**2<sup>nd</sup> Issue:** The second issue the Court analyzed was whether the threat to make the plaintiff's life a living hell amounted to intimidation and the Court concluded it was. The standard is not based on whether a reasonable person would experience fear or intimidation but rather how the plaintiff felt.

**3<sup>rd</sup> Issue:** The third act of harassment, a threat to punch the plaintiff in the breasts, is clearly an act of harassment, and it is significant in evaluating the pattern of harassment as a whole that this third act took place **after** the defendant had sent the plaintiff some kind of a letter of apology.

The Court further stated that the incident in the cafeteria provides further evidence that the FaceTime incident was not just a dumb remark by a clueless eleven year old, but part of a pattern of conduct intended to isolate and intimidate this eleven year old girl. In this case, the defendant's repeated and escalating harassment of the plaintiff, each time involving additional classmates, and then persisting after adult intervention, would reasonably support an inference that he intended to cause the plaintiff fear and intimidation. "However, there is no need to draw inferences here, because the defendant said explicitly what his intent was — to make the plaintiff's life a living hell. He also explained, on more than one occasion, his motive for doing so.

The Court did not agree that the facts presented only amount to an eleven year old boy using poor judgment. Although age can be a factor when considering intent, the legislature clearly considered this issue because it awarded juvenile court with exclusive jurisdiction over G.L. 258E orders directed at juveniles. "As a result, it is fair to conclude that, when the Legislature deliberately entrusted to the trial court department most experienced with juveniles exclusive authority to issue harassment orders against them, it had young people's limitations and abilities particularly in mind. It also is a fair inference that, had the members of the Legislature intended to put eleven year olds beyond the reach of G.L. c.258E, they would have done so." Given all that has transpired, the Court affirmed the protection order for the plaintiff pursuant to G.L.c.258E, and ordered that the defendant to stay ten yards away from her."



### **Differences between 209A and 258 E Orders**

	<b>209 A Orders Restraining Orders</b>	<b>258 E Orders</b>
<b>Definition</b>	<b>Suffering abuse:</b> <ul style="list-style-type: none"> <li>➤ Causing physical harm</li> <li>➤ Or placing another in fear of imminent serious physical harm</li> <li>➤ Or causing another to engage involuntarily in sexual relations by threat, force or duress</li> </ul> <b>Includes Family or Household Members</b> <ul style="list-style-type: none"> <li>➤ Who are married or living together</li> <li>➤ Related by blood or marriage</li> <li>➤ Have a child together regardless of living arrangement</li> <li>➤ Dating or engaged</li> </ul>	<b>Harassment: 3 or More Acts</b> <ol style="list-style-type: none"> <li>1) Aimed at a specific person</li> <li>2) Was willful and malicious</li> <li>3) Intended to target the victim with the harassing conduct or speech, or series of acts, on each occasion;</li> <li>4) Conduct or speech, or series of acts, were of such a nature that they seriously alarmed the victim;</li> <li>5) Or one act that by force, threat or duress causes another to involuntarily engage in sexual relations</li> <li>6) Or one act that constitutes one of the crimes of sexual assault, harassment and stalking</li> </ol>
<b>Jurisdiction</b>	Family, Probate, District Courts, BMC and Superior Courts (except for dating relationships)	District Courts, Superior Court, BMC and Juvenile Court if both parties under 17 years old
<b>Venue</b>	Plaintiff's residence Plaintiff's former residence left to avoid abuse	Plaintiff's residence
<b>Timeliness</b>	No time constraints as when to file the order	No time constraints as when to file the order
<b>Relief</b>	No abuse the plaintiff No contact the plaintiff Vacate plaintiff's household, multiple family dwelling and workplace Pay restitution Temporary custody of minor child Surrender firearms, gun licenses and FID cards	Court can issue order that the (a) defendant refrain from abusing or harassing the plaintiff, (b) no contact with plaintiff, (c) remaining away from plaintiff's home or workplace and (d) pay restitution directly related to losses. <b>No Surrender of Firearms or FID Card</b>

### **Abuse on People with an Intellectual Disability**

**Commonwealth v. St. Louis**, 473 Mass. 350, (2015): The SJC held that the term "intellectual disability" in G. L. c. 265, § 13F (indecent assault and battery on a person with an intellectual disability) was sufficiently clear and definite, and therefore not unconstitutionally vague.

The legislative history of § 13F, as amended through St. 2010, c. 239, §§ 71-72, makes it clear that the Legislature's intent in changing the statute's language from "*mentally retarded*"

person" to "person with an intellectual disability" was merely to change the nomenclature and not the substance of the statute.

In recognizing that the definition for "intellectual disability" in §13F is not the same as the definition for a "person with disability" in G. L. c. 265, §13K, the Court suggests that future jury instructions for § 13F, should incorporate the definition of intellectual disability from the Department of Developmental Services regulations, provided below.

**115 Code Mass. Regs. § 2.01:** Intellectual Disability means, consistent with the standard contained in the 11th edition of the American Association of Intellectual Disabilities: Definition, Classification, and Systems of Supports (2010), significantly sub-average intellectual functioning existing concurrently with and related to significant limitations in adaptive functioning. Intellectual Disability originates before age 18. A person with intellectual disability may be considered to be mentally ill as defined in 104 CMR (Department of Mental Health), provided that no person with intellectual disability shall be considered to be mentally ill solely by reason of his or her intellectual disability. The determination of the presence or absence of intellectual disability requires that exercise of clinical judgment.

## **IV. FIREARMS AND NEW TRENDS**

### **Types of Firearms & Dangerous Weapons**

**The US Supreme Court vacates the conviction in the Caetano case and concludes that possession of stun guns does not violate Second Amendment!**

***Jaime Caetano v. Massachusetts***, 136 S.Ct. 1027 (2016): Jaime Caetano was involved with an abusive boyfriend who had put her in the hospital. Caetano purchased a stun gun to defend herself against her ex-boyfriend. She had previously obtained multiple restraining orders against her abuser, but they proved futile. On one occasion after having the stun gun, Caetano's ex-boyfriend started screaming at her outside of her work. Caetano told her ex-boyfriend she would use the stun gun on him if he did not leave. The threat worked and he left.

In 2011, Ashland police officers were dispatched to a supermarket for a possible shoplifting. Upon arrival, the supermarket manager directed police to a man who was standing next to a motor vehicle in the parking lot. The police approached the vehicle and located Caetano who was sitting in the passenger seat of the vehicle. Police searched Caetano's purse with her consent and they recovered the stun gun. Caetano told police that she kept the stun gun as protection from her ex-boyfriend.

G. L. c. 140, § 131J, prohibits private citizens from possessing a stun gun.

***Specifically, this statute "prohibits the possession of any portable device or weapon from which an electrical current, impulse, wave or beam may be directed, which current, impulse, wave or beam is designed to incapacitated temporarily injure or kill."***

Police charged Caetano with violating G. L. c. 140, § 131J, and she filed a motion to dismiss, which was denied. Caetano was found guilty of illegally possessing a stun gun after a trial and the case was placed on file. A few months later, Caetano filed a motion challenging the disposition of her case. The SJC heard the case on direct appellate review and considered whether a stun gun should be considered an “arm” for purposes of the Second Amendment if the weapon is used primarily for self-defense.

**Conclusion:** The US Supreme Court concluded that “the Second Amendment extends, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding,” ***District of Columbia v. Heller***, 554 U. S. 570, 582 (2008), and that the “Second Amendment right is fully applicable to the States,” ***McDonald v. Chicago***, 561 U. S. 742, 750 (2010). The US Supreme Court overturned the Massachusetts SJC’s decision in the Caetano case and remanded for further proceedings.

**1<sup>st</sup> Issue: The Supreme Court finds that the Second Amendment does not exclude stun guns!**

The Supreme Court held that the Second Amendment does extend to stun guns even though those items were not in common use at the time of the Second Amendment’s enactment. “It is well settled that the Second Amendment protects an individual right to keep and bear arms that applies against both the Federal Government and the States. See ***District of Columbia v. Heller***, 554 U.S. 570 (2009). This basic right extends to an individual’s right of self-defense. Based on this interpretation, the Supreme Court found that the Massachusetts SJC’s reasoning that a stun gun is not the type of weapon eligible for Second Amendment protection contradicts ***Heller***, which determined that the Second Amendment’s right to bear arms is not restricted to arms that were in existence in the 18<sup>th</sup> century. The Supreme Court further added that “electronic stun guns are no more exempt from the Second Amendment’s protections, simply because they were unknown to the First Congress, than electronic communications are exempt from the First Amendment, or electronic imaging devices are exempt from the Fourth Amendment.” See ***Reno v. American Civil Liberties Union***, 521 U.S. 844 (1997).

**2<sup>nd</sup> Issue: The Supreme Court finds that the Massachusetts ban on stun guns violates the Second Amendment.**

The Supreme Court held that the Massachusetts SJC erred when it concluded that stun guns are “dangerous per se at common law and unusual,” and therefore should be banned. The Massachusetts SJC’s ruling was an attempt to limit an individual’s right to bear arms,” according to the Supreme Court. “As the per curiam opinion recognizes, this is a conjunctive test: A weapon may not be banned unless it is both *dangerous* and *unusual*.” Although the Supreme Court was not required to address whether stun guns are *dangerous*, because it did not agree with the lower court’s conclusion that stun guns are “*unusual*,” the Supreme Court chose to address the SJC’s categorization that stun guns are both *dangerous* and *unusual*. ***Heller*** established that even though firearms are dangerous, they cannot be prohibited because the Second Amendment includes “anything that a man wears for his defense or takes into his hands or uses in wrath to cast at or strike another.” For Caetano, she used the stun gun to protect herself against her ex-boyfriend.

The Supreme Court also did not agree with the SJC's designation that stun guns are *unusual* because they are a "thoroughly modern invention," and cannot be used in as a weapon by the militia. **Heller** established that members of the militia reported to duty carrying weapons that they possessed from home which meant that the Second Amendment protects weapons regardless of suitability for military use. Under G.L. c. 140, § 131J, law enforcement and correctional officers can carry stun guns and Tasers to subdue crowds or an unruly mob. By equating "unusual" with "in common use at the time of the Second Amendment's enactment," the SJC's explanation is inconsistent with **Heller**. In most states, "[h]undreds of thousands of Tasers and stun guns have been sold to private citizens," who it appears may lawfully possess them in 45 States which refutes the SJC's designation that stun guns are *unusual*. Although stun guns are less popular than handguns, "stun guns are widely owned and accepted as a legitimate means of self-defense across the country. Massachusetts' ban such weapons violates the Second Amendment."

**3<sup>rd</sup> Issue: The Second Amendment is not restricted to protect only weapons useful in warfare.**

Finally, the SJC concluded that it does not appear that stun guns are readily adaptable to use in the military." However, **Heller** contradicts this finding and concluded that the Second Amendment does not only regard "those weapons useful in warfare as protected." 554 U. S., at 624–625. The Supreme Court determined that the SJC's reasoning regarding its interpretation of weapons is a "grave threat to the fundamental right of self-defense." The SJC suggested that Caetano should have used a firearm to defend herself rather than a stun gun. The Supreme Court held that a weapon is only an effective means of self-defense if an individual is prepared to use it. Here, Caetano opted for a non-lethal weapon to protect herself and as a result she was charged and convicted. **If the fundamental right of self-defense does not protect Caetano, then the safety of all Americans is left to the mercy of state authorities who may be more concerned about disarming the people than about keeping them safe.**

- ❖ **TRAINING TIP:** It is important to be aware of the Supreme Court's ruling in the **Caetano** case. However, until the SJC issues a decision or the legislators amend G.L. c. 140, § 131J, it is status quo. In light of this ruling, if an officer would consider criminally charging a person for mere possession of an electronic control weapon, consult with your legal advisor or prosecutor for additional guidance.

***The SJC holds that a BB gun does not qualify as a "firearm" when used in an armed robbery pursuant to G.L. c. 265, § 17.***

**Commonwealth v. Garrett**, 473 Mass. 257 (2015): The defendant, Raheem Garrett, and his girlfriend used a BB gun to rob stores in the city of Pittsfield. The defendant first robbed a pizza shop while wearing a homemade black mask. The defendant pointed at the assistant store manager what appeared to him to be a gun, and demanded the money from the cash register while the defendant's girlfriend acted as the getaway driver, waiting in her white GMC sport utility vehicle (SUV). During a second robbery, the defendant robbed a convenience store wearing a black mask and again using a BB gun.

Approximately two months later, the defendant and his girlfriend returned to the pizza shop. The same store manager recognized the mask and clothing worn by the robber as those worn during the previous robbery, and the weapon as the same one the prior robber had brandished. When the robber demanded that the store manager give him money, the manager recognized the robber's voice that of the first robber. The manager handed over the money and when the robber left the store, the manager saw a white SUV, either a GMC Jimmy or a Chevrolet Blazer, leaving the parking lot quickly and driving north without any headlights. The manager called 911 and the defendant and his girlfriend were arrested. The defendant was convicted on three indictments counts of armed robbery with a firearm while masked, in violation of G.L. c. 265, §17, and he appealed arguing that a BB gun does not satisfy the statutory requirement of a "firearm" within the meaning of G.L. c. 265, §17.

**Conclusion:** The SJC concluded that a BB gun does not satisfy the statutory requirement of a "firearm" within the meaning of G. L. c. 265, § 17, therefore the defendant's convictions of armed robbery by means of a firearm must be vacated.

### **Is a BB gun considered a firearm under the armed robbery statute?**

The SJC first examined the armed robbery statute, G.L. c. 265, §17, and found that there is no explicit definition for a firearm contained in the statute nor were there any other statutes referenced within the statute.

Second, the SJC considered the legislation surrounding the gun laws in Massachusetts. The SJC concluded that there is nothing within the gun control act of 1998 that indicates the legislature intended to regulate BB guns in the same manner as firearms. Pursuant to G.L. c. 140, §121, a firearm is defined as "a pistol, revolver or other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged and of which the length of the barrel or barrels is less than 16 inches or 18 inches in the case of a shotgun as originally manufactured." Since this statute does not mention BB guns, the SJC determined that the legislators did not intend to regulate BB guns in the same manner as firearms. Additionally, the gun control act has always provided separate regulations for BB guns.

In prior cases, the SJC considered whether a BB gun would be treated like a firearm. The SJC established in the **Fenton** case that a person carrying an air gun could not be convicted of unlawfully carrying a firearm under G.L. c. 269, § 10(a), because an air gun was not a firearm. **Commonwealth v. Fenton**, 395 Mass. 92 (1985). According to the SJC's analysis of G.L. c. 269 §12B, legislators were concerned with the actions of minors in possession of BB guns and that is why there were separate provisions for this type of situations. The SJC highlighted that adults are not subject to the same restrictions for possessing BB guns as minors. "Since G.L. c. 269, §12A and 12B were enacted in 1951, the Legislature has not amended the statutory scheme to provide explicitly that BB guns should be treated in the same manner as firearms for purposes of the gun control act." The Legislature also has not amended the definition of a firearm to include air rifles or BB guns since the **Fenton** case.

In 1998 when the Legislature revised sentencing provisions for certain crimes including using a firearm during the commission of an armed robbery, the definition of firearm did not change to include BB guns nor did the Legislature expand the provisions for BB gun licensing

to include adults. "If BB guns were construed as firearms, they would be subject to the entire gun control act which would require that only licensed dealers could sell BB guns pursuant to G.L. c. 140, §123; background checks would be mandatory before obtaining a license to possess a BB gun, G.L. c. 140, §131; and all BB guns would be required to bear serial identification numbers, G.L. c. 269, §11E. Even more troubling, if the gun control act were to apply to BB guns, all of the criminal statutes regulating the possession and use of firearms would apply to BB guns, and to the minors who are authorized to use BB guns under G.L. c. 269, §12B. For instance, G.L. c. 140, §131L(a), establishes that it is unlawful to store or keep any firearm ... in any place unless such weapon is secured in a locked container or equipped with a tamper-resistant mechanical lock so as to render such weapon inoperable by any person other than the owner or other lawfully authorized user. Bootstrapping BB guns into this requirement would impose a layer of regulation, with criminal penalties for any violation, upon the proper storage of BB guns. This potentially would subject a broad group of minors to severe adult criminal penalties, with the attendant negative consequence of an adult criminal record. The Legislature could not have intended such a result."

Based on its review of the gun legislature in Massachusetts, the SJC concluded that a BB gun does not satisfy the statutory requirement of a "firearm" within the meaning of G. L. c. 265, § 17.

### **"Denials" of LTC in Massachusetts**

#### **Reckless Domestic Violence Misdemeanor Convictions**

***The Supreme Court holds that federal ban on firearms extends to the misdemeanor crime of reckless domestic assault.***

***Voisine v. United States***, 136 S.Ct. 2272 (2016): Petitioners Stephen Voisine ("Voisine") and William Armstrong ("Armstrong") both pleaded guilty to separate acts of domestic violence. Voisine assaulted his girlfriend in violation of §207 of the Maine Criminal Code, which makes it a misdemeanor to "intentionally, knowingly or recklessly cause bodily injury" to another."

Armstrong had pleaded guilty to assaulting his wife in violation of a Maine domestic violence law making it a misdemeanor to commit an assault prohibited by §207 against a family or household member. Police learned later in a separate investigation that owned a rifle when he was suspected of killing a bald eagle. A background check revealed that Voisine had a prior conviction under §207 and the Government had charged him with violating §922(g)(9).

In a separate incident involving narcotics, police discovered that Armstrong had six guns and a large quantity of ammunition. Armstrong was also charged under §922(g)(9). Both Voisine and Armstrong argued that they were not subject to §922(g)(9)'s prohibition because their prior convictions could have been based on reckless, rather than knowing or intentional, conduct and thus did not qualify as misdemeanor crimes of domestic violence. The District Court rejected those claims, and each petitioner pleaded guilty. The First Circuit affirmed, holding that "an offense with a ***mens rea*** of recklessness may qualify as a 'misdemeanor crime of violence' under §922(g)(9)." Voisine and Armstrong filed a joint petition for certiorari, and their case was remanded for further consideration in light of ***Castleman***. The First Circuit again upheld the convictions on the same ground. The Supreme Court heard the case on

appeal and was left to answer whether a misdemeanor assault conviction for reckless (as contrasted to knowing or intentional) conduct triggers the statutory firearms ban.

**Conclusion:** The Court holds that a reckless domestic assault qualifies as a “misdemeanor crime of domestic violence” under §922(g)(9).

Federal law prohibits any person convicted of a “misdemeanor crime of domestic violence” from possessing a firearm. 18 U. S. C. §922(g)(9). That phrase is defined to include any misdemeanor committed against a domestic relation that necessarily involves the “use . . . of physical force.” §921(a)(33)(A). Twenty years ago, in ***United States v Castleman***, the federal government attempted to close a loophole in the gun control laws by extending the federal prohibition on firearms possession by convicted felons to persons convicted of a “misdemeanor crime of domestic violence,” 18 U. S. C. §922(g)(9).

***Section 921(a)(33)(A) defines that phrase to include a misdemeanor under federal, state, or tribal law, committed against a domestic relation that necessarily involves the “use . . . of physical force.”***

While ***Castleman*** addressed assaults that are knowing or intentional, it did not answer whether a reckless assault was the same. In the underlying appeal, the Court found that a “misdemeanor crime of violence” contains no exclusion for convictions based on reckless behavior. A person who assaults another recklessly “uses” force, no less than one who carries out that same action knowingly or intentionally.”

In one example, the Court highlights how a husband who throws a plate in anger against the wall where his wife is standing would qualify as a reckless assault. The Court emphasized that “the hurl counts as “use of force” even if the husband did not know for certain but only recognized a substantial risk that a shard from the plate would ricochet and injure his wife.”

There is nothing about the definition of “use” that demands the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so. Similarly, in ***Leocal v. Ashcroft***, 543 U. S. 1 the “use” of force was established to exclude accidents. Reckless conduct, which requires the conscious disregard of a known risk, is not an accident: It involves a deliberate decision to endanger another. The relevant text thus supports prohibiting petitioners, and others with similar criminal records, from possessing firearms as does the relevant history.

### ***History of Domestic Violence Sufficient to Deny LTC***

***Chief of Police of the City of Worcester v. Raymond J. Holden, Jr.*** 470 Mass. 845, (2015): The SJC determined that the Worcester police chief properly denied the petitioner, Raymond J. Holden a License to Carry Firearms (LTC) due to his history of domestic violence. Holden appealed arguing that the Chief violated his due process rights under the Second Amendment.

In 2005, police responded to Holden’s daughter’s house after he showed up there with his wife. Earlier in the evening, Holden argued with his wife and punched her in the face.

Holden's wife had a swollen lip and scratch over her eye. Police charged Holden with domestic assault and battery. After the charges issued, the police chief suspended Holden's license to carry. The criminal charges were dismissed at the request of Holden's wife. Holden appealed the denial of his license to carry due to the charges being dismissed and a district court judge found the police chief's denial arbitrary and capricious. The police chief appeal and a Superior Court found that it is within the police chief's discretion to deny issuing a license to carry for suitability. Holden appealed to the SJC and argued that the "suitable person" standard violates the Second Amendment and that the statutory scheme for suspension and revocation of licenses in Massachusetts violates due process. Additionally, Holden argues that "suitable person" standard permits a police chief to disqualify a person permanently without current cause and therefore is unconstitutional. Lastly, Holden maintains that the police chief's decision was not based on substantive evidence.

**Conclusion:** The SJC upheld the Superior Court's determination that the police chief has discretion to deny issuing a license to carry. Further, the SJC concluded that the facts in the record do not show that the Chief's decision was arbitrary or capricious or that it was heavy-handed. To the contrary, the District Court judge found after an evidentiary hearing that in approximately six years since 2006, the Chief granted approximately 3,200 applications for licenses to carry and denied or suspended approximately 200 such applications and licenses." Based on all the facts of the record, the SJC found that absent any evidence that the Chief's decision was arbitrary and capricious, it is within the Chief's authority to deny issuing a firearms license based on suitability grounds.

The SJC stated that the purpose of **G.L. C. 140 § 131**, is that Massachusetts law "seeks to limit access to deadly weapons by irresponsible people." Here, although the initial criminal case was dismissed and years had passed, the SJC did not find that chief only has a certain definitive period of time to consider an incident when deciding whether to issue a firearms license. The SJC added that Holden could have sought a professional evaluation, and, if necessary, treatment, and provide the appropriate documentation to the chief to alleviate his legitimate concerns about Holden's unsuitability. Based on the evidence, it appears that Holden never pursued any professional evaluations.

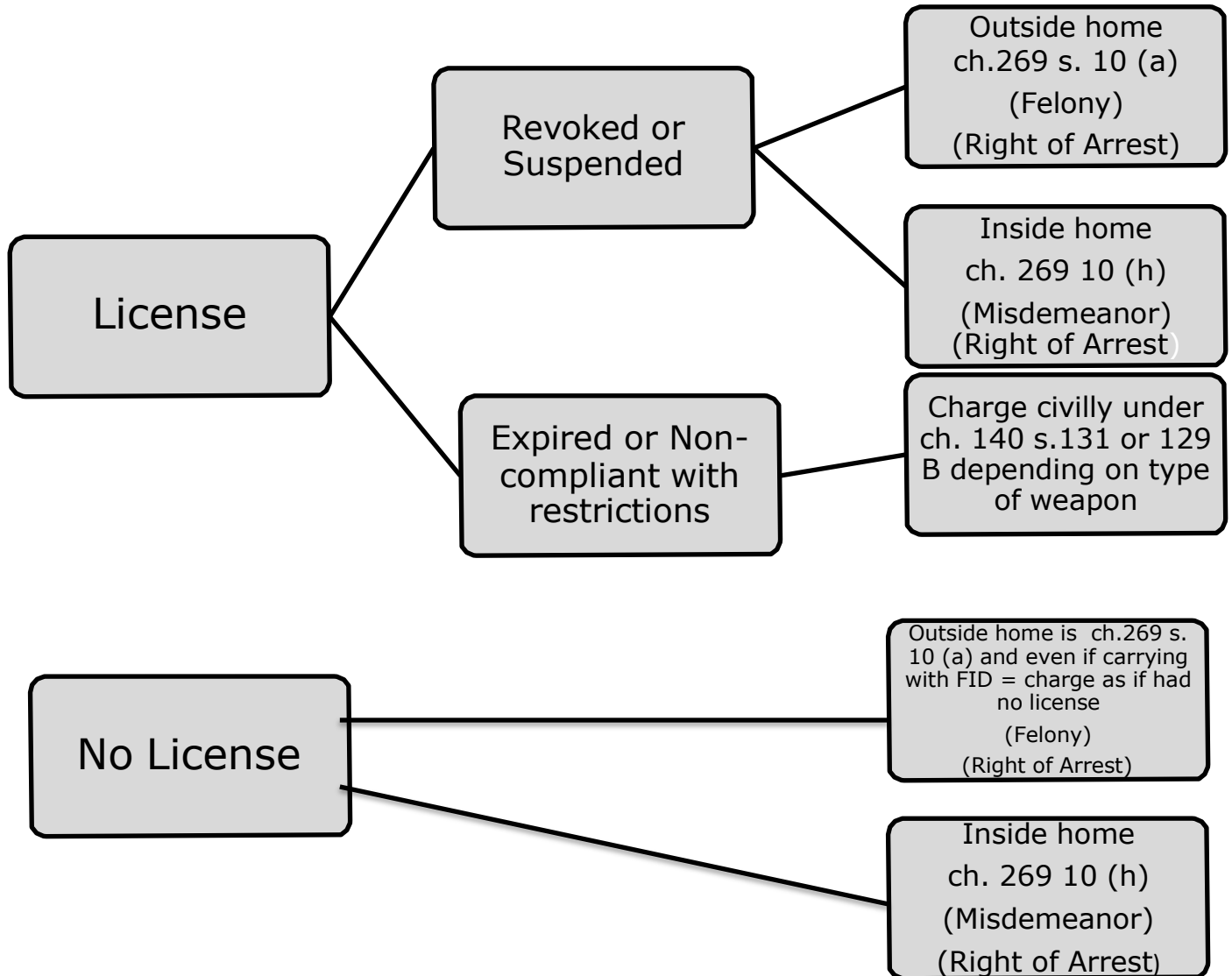
***An individual with Class A unrestricted license to carry firearms does not have to conceal the firearm in public.***

***Firearms Records Bureau v. Simkin***, 466 Mass. 168 (2013): The SJC held that because Simkin held an unrestricted Class A license to carry firearm with no restrictions he was allowed to carry firearms "for all lawful purposes." G. L. c. 140, § 131 (a) including into a medical office. Simkin's decision to carry his firearms to his medical appointment did not make him unsuitable to have a License to Carry. The SJC stated that the medical staff's claim that Simkin caused alarm because he was "heavily armed" was meritless." Simkin is not responsible for alarm caused to others by his mere carrying of concealed weapons pursuant to a license permitting him to do so and therefore his license should never have been revoked for suitability issues



### **Charging Violations of Firearms Law**

**Note: These charges apply to handguns, rifles and shotguns. Also, if an individual is carrying a handgun with only a FID card, the correct charge ch. 269 s. 10 (a) violation.**



# Firearms Violations

**M.G.L. c. 269, § 10(a)**  
**(non-large capacity firearms,**  
**rifles and shotguns)**

Possessing in public or in a vehicle a non-large capacity firearm (handgun), rifle, or shotgun without a License to Carry (required for handgun) or an FID card (required for rifle or shotgun).

§ 10(a) **does not apply to** possession in **home or business**, but it does apply in common areas of apartment buildings or businesses.

- ☐ Felony
- ☐ Mandatory minimum 18-month jail sentence.
- ☐ Applies to both handguns and long guns.

**M.G.L. c. 269, § 10(m)**  
**(large capacity firearms,**  
**rifles, shotguns, and feeding**  
**devices)**

Possessing **anywhere** a large capacity firearm (handgun), rifle, or shotgun; or a large capacity **feeding device manufactured before 09/13/1994**; without a License to Carry Firearms.

- ☐ Felony
- ☐ Mandatory minimum 18-month jail sentence.
- ☐ FID card exempts offender from 18-mo. mandatory minimum jail sentence.
- ☐ Exemption for LEO

**M.G.L. c. 140, § 131M**  
**(assault weapons and illegally**  
**possessed large capacity feeding**  
**devices)**

Possessing, selling, offering to sell, or transferring an assault weapon as defined in G.L. c. 140, § 121, or a large capacity feeding device, **manufactured after 09/13/1994** under any circumstances.

- ☐ Felony
- ☐ Exemption for LEO

**M.G.L. c. 269, § 10(c) (machine**  
**guns and sawed off shotguns)**

Possessing a **machine gun** without a machine gun license; or a **sawed-off shotgun** under any circumstances.

- ☐ Felony
- ☐ Life in state prison

**M.G.L. c. 269, § 10(h)(1)**  
**(non-large capacity firearms,**  
**rifles, shotguns, and**  
**ammunition)**

Possessing non-large capacity firearms, rifles, shotguns or ammunition in one's **house or place of business** without an FID card.

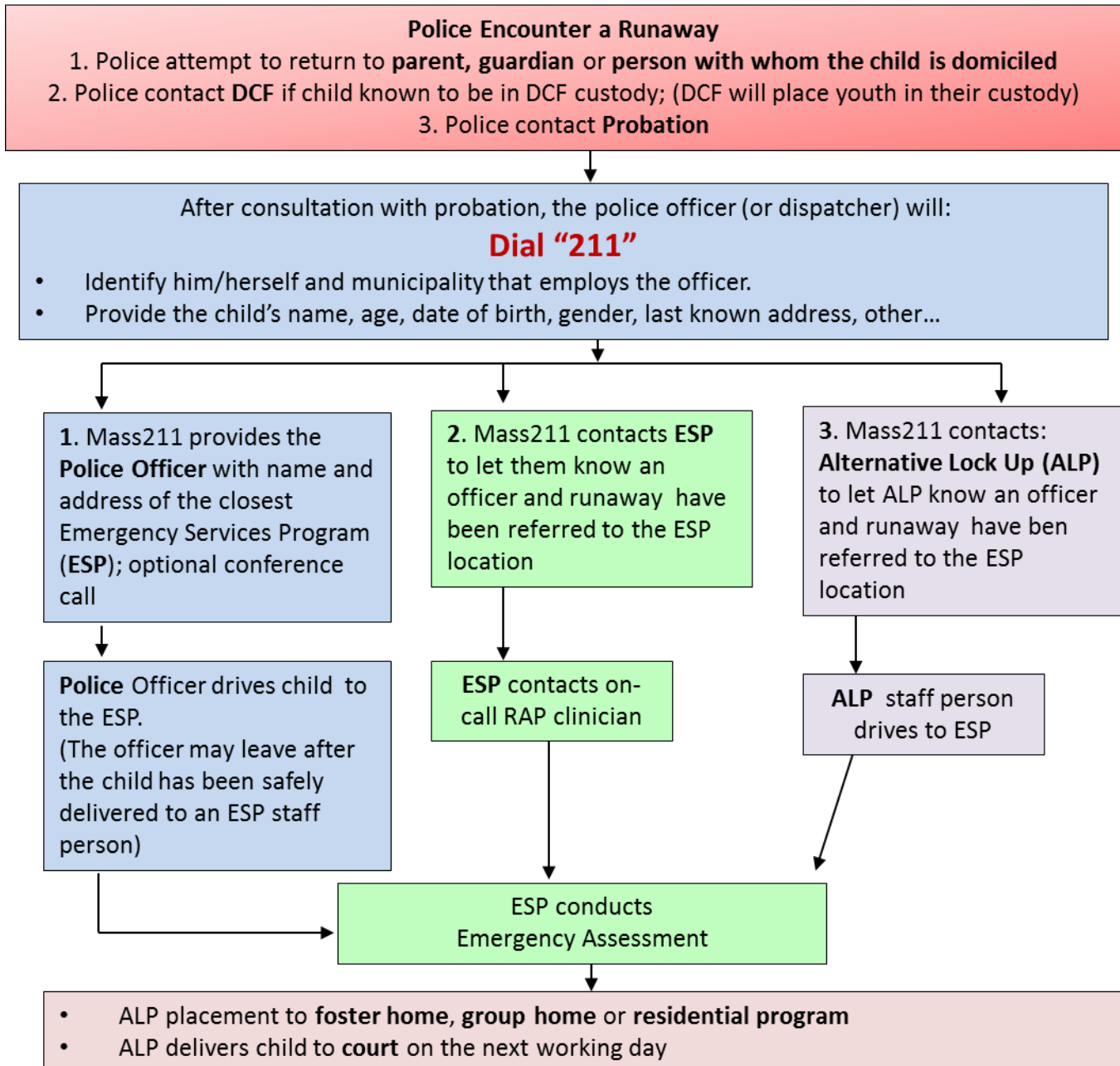
- ☐ Misdemeanor
- ☐ Right of arrest

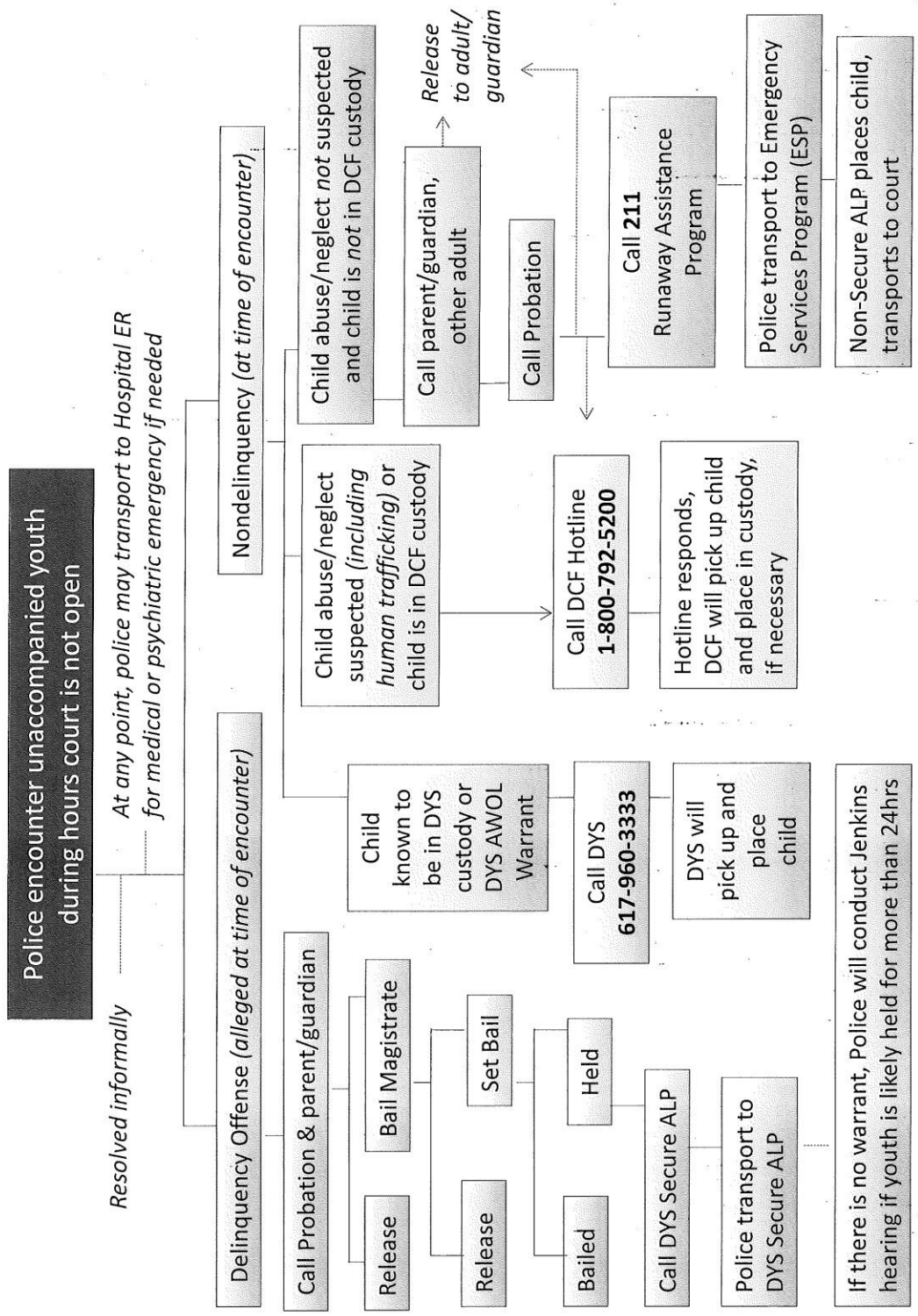


# Runaway Assistance Program Pilot

## Flow Chart

*(revised August 12, 2015)*





## **VI. Recent Legislation**

### **Opioid Bill**

**Chapter 52 of the Acts of 2016:** On March 14, 2014, the Governor signed into law **H. 4056, An Act Relative to Substance Use, Treatment, Education and Prevention**. Most provisions of this bill are effective immediately, but sections 70-77 of the new law prescribe different effective dates for particular sections. The bill impacts policing, but also adds provisions for schools and medical professionals

#### **Impact on Police**

- ❖ Allows MPTC to provide Narcan training in Recruit & In-Service training.
- ❖ Anyone who administers Narcan in good faith will not be liable for “ordinary negligence.”

#### **Impact on Schools**

- ❖ Each public school shall have a policy regarding substance use prevention that should educate its students about the dangers of substance abuse. The policy should be posted at the beginning of the year. The policy should be filed with the Department of Education.
- ❖ There is a new screening process for schools that will be rolled out for the 2017-18 school year. Students in middle school and in high school will be verbally screened in an effort to identify students who are addicted or at risk of becoming addicted. The screening process should occur annually if resources allow for it.
  - a. Parents will be notified of the screenings at the start of the school year.
  - b. Parents can opt their child out of the screening process if they provide written notification.
  - c. Any statements made by a student during the verbal screenings are considered confidential and can only be disclosed if the student or parent or guardian of the student provides written consent. State law requires disclosure in the case of an immediate medical emergency. Any disclosures by a student cannot be used in discovery or obtained through subpoena for any civil, criminal, legislative, or administrative proceeding.
- ❖ Mandates substance abuse education as part of Driver Education. There will be a required module about addiction and addictive substances.
- ❖ Annual opioid addiction education will be integrated into high school sports training.

#### **Impact on Medical Personnel**

7 Day Limit on opioid prescriptions: Any first-time prescriptions for opioid drugs that are prescribed as painkillers after a surgery or an injury are limited to a 7 day supply.

**Exception:** A prescription can exceed the 7 day limit for patients that have cancer or chronic pain, or require palliative care. Any treatment plan that exceeds the limit must be entered into a written pain management treatment agreement and included in the patient's health record.

- ❖ There is a 7 day limit for all for all opioid prescriptions for minors.
- ❖ Allows patients to fill a lesser amount of an opioid prescription than the prescription states.
- ❖ Requires practitioners who prescribe controlled substances, except veterinarians, when obtaining or renewing their professional licenses, to complete training relative to a number of issues related to opioid addiction. The Boards of

Registration for each professional license that requires this training shall develop the standards for appropriate training programs.

- ❖ Requires doctors and pharmacists to give patients information about the dangers of opioid addition
- ❖ Requires doctors to check *Prescription Monitoring Program* each time they prescribe an addictive opioid to make sure patients are not seeking multiple prescriptions from doctors.
- ❖ Mental health professionals will have to provide a substance abuse evaluation for anyone who overdoses from an opioid within 24 hours before he or she is discharged.

Notification requirements:

1. Parent or a guardian must be notified if a victim under 18 overdoses;
  2. Notification of OD Victim's PCP.
- ❖ No "*72 hour hold provision*" allowing hospitals to involuntarily hold an overdose victim.
  - ❖ Any pharmacy employees who have a substance abuse issue will have access to a rehabilitation program.

**Miscellaneous Provisions**

- ❖ "*Warrants of apprehension*" issued under G.L. c. 123, § 35, will remain active for up to 5 consecutive days, excluding days when court is closed. There will be no service of warrant unless court is in session.
- ❖ Establishes the *Drug Stewardship Program* under G.L. c. 94G, which allows for unneeded drugs to be safely discarded.

- ❖ Allows for *Statewide Centralized Substance Abuse Referral & Education System* so municipal police officers can obtain information by phone or online regarding referral to treatment for individuals seeking treatment at local police departments.
- ❖ Outlaws “powdered alcohol.” Anyone who sells, manufactures, or possesses powdered alcohol will be fined not more than \$1000 and not less than \$100.

### **Impact on Schools**

- ❖ Notification requirements:
  1. Parent or a guardian must be notified if a victim under 18 overdoses;
  2. Notification of OD Victim’s PCP.
- ❖ No “72 hour hold provision” allowing hospitals to involuntarily hold an overdose victim.
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- ❖ Establishes the *Drug Stewardship Program* under G.L. c. 94G, which allows for unneeded drugs to be safely discarded.
- ❖ Allows for *Statewide Centralized Substance Abuse Referral & Education System* so municipal police officers can obtain information by phone or online regarding referral to treatment for individuals seeking treatment at local police departments.
- ❖ Anyone who administers Narcan in good faith will not be liable for “ordinary negligence.”
- ❖ Outlaws “powdered alcohol.” Anyone who sells, manufactures, or possesses powdered alcohol will be fined not more than \$1000 and not less than \$100

### **Transgender Bill**

**Chapter 121 of the Acts of 2016:** On July 7, 2016, the Governor signed into law **S.2407 *An Act Relative to Transgender Anti-Discrimination.*** Sections 2 and 3 of this bill are effective October 1, 2016 while the remaining sections of the new law are effective dates for particular September 1, 2016.

### **Public Facilities**



- ❖ Transgender people have the right to use public restrooms and locker rooms consistent with their gender identities, regardless of their sex at birth.
- ❖ Shall, directly or indirectly, by himself or another, publish, issue, circulate, distribute or display, or cause to be published, issued, circulated, distributed or displayed, in any way, any advertisement, circular, folder, book, pamphlet, written or painted or printed notice or sign, of any kind or description, intended to discriminate against or actually discriminating against persons of any religious sect, creed, class, race, color, denomination, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, nationality, or because of deafness or blindness, or any physical or mental disability, in the full enjoyment of the accommodations, advantages, facilities or privileges offered to the general public by such places of public accommodation, resort or amusement.  
**(effective October 1, 2016)**
- ❖ What qualifies as a public accommodation, resort or amusement?
  1. any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public.  
Examples:
    - (a) an inn, tavern, hotel, shelter, roadhouse, motel, trailer camp or resort for transient or permanent guests or patrons seeking housing or lodging, food, drink, entertainment, health, recreation or rest;
    - (b) a carrier, conveyance or elevator for the transportation of persons, whether operated on land, water or in the air, and the stations, terminals and facilities appurtenant thereto;
    - (c) a gas station, garage, retail store or establishment, including those dispensing personal services;
    - (d) a restaurant, bar or eating place, where food, beverages, confections or their derivatives are sold for consumption on or off the premises;
    - (e) a rest room, barber shop, beauty parlor, bathhouse, seashore facilities or swimming pool, except such rest room, bathhouse or seashore facility as may be segregated on the basis of sex;
    - (f) a boardwalk or other public highway;
    - (g) an auditorium, theatre, music hall, meeting place or hall, including the common halls of buildings;
    - (h) a place of public amusement, recreation, sport, exercise or entertainment;
    - (i) a public library, museum or planetarium; or
    - (j) a hospital, dispensary or clinic operating for profit;

- ❖ **TRAINING TIP:** Public accommodations do not include a place of exercise for the exclusive use of persons of the same sex which is a bona fide fitness facility established for the sole purpose of promoting and maintaining physical and mental health through physical exercise and instruction, if such facility is privately funded or operated.

Also, public accommodations do not include places that rent rooms on a temporary or permanent basis for the exclusive use of persons of the same sex.

- ❖ MCAD will devise policies on what is considered gender identity (effective September 1, 2016)
- ❖ Attorney General's Office will issue regulations or guidance to police or other authorities when there is evidence that a person is asserting a specific gender identity for an improper purpose (effective September 1, 2016)

"Gender identity" shall mean a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth. Gender-related identity may be shown by providing through medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held as part of a person's core identity; provided, however, that gender-related identity shall not be asserted for any improper purpose.

### **Stolen Valor**

***Chapter 128 of the Acts of 2015 was enacted into law on November 23, 2015.***

Chapter 272 of the General Laws is hereby amended by adding the following section:-

Section 106. (a) A person commits the crime of stolen valor if that person knowingly, with the intent to obtain money, property or any other tangible benefit:

(i) fraudulently represents such person to be an active member or veteran of the United States Navy, Army, Air Force, Marines or Coast Guard, including armed forces reserves and National Guard through the unauthorized manufacture, sale or use of military regalia or gear, including the wearing of military uniforms, or the use of falsified military identification and obtains money, property or another tangible benefit through such fraudulent representation; or

(ii) fraudulently represents such person to be a recipient of the Congressional Medal of Honor, Distinguished Service Cross, Navy Cross, Air Force Cross, Silver Star, Purple Heart, Combat Infantryman Badge, Combat Action Badge, Combat Medical Badge, Combat Action Ribbon or Air Force Combat Action Medal and obtains money, property or another tangible benefit through such fraudulent representation.

(b) Any person who commits the crime of stolen valor shall be punished by imprisonment in a house of correction for not more than 1 year or by a fine of \$1,000, or both such fine and imprisonment.

### **Fentanyl**

***Chapter 136 of the Acts of 2014 was enacted into law on November 24, 2015.***

Section 32E of chapter 94C of the General Laws, is amended by inserting the additional sections listed below:

(c<sup>1/2</sup>) Any person who trafficks in fentanyl, by knowingly or intentionally manufacturing, distributing, dispensing or possessing with intent to manufacture, distribute or dispense or by bringing into the commonwealth a net weight of more than 10 grams of fentanyl shall be punished by a term of imprisonment in state prison for not more than 20 years.

For purposes of this subsection, "fentanyl" shall include any derivative of fentanyl and any mixture containing more than 10 grams of fentanyl or a derivative of fentanyl.

- ❖ **TRAINING TIP:** For a policing perspective, this act makes it illegal to traffick more than 10 grams of fentanyl or any derivative of fentanyl or mixture containing more than 10 grams.

# Chapter 4

## ADDENDUM



Paul C. Dawley  
Chief Justice

### Trial Court of the Commonwealth District Court Department

Administrative Office  
Edward W. Brooke Courthouse  
24 New Chardon Street, 1<sup>st</sup> Floor  
Boston, MA 02114-4703

#### TRANSMITTAL NO. 1171

Last Transmittal No. to:	
First Justices	1170
Other Judges	1170
Clerk Magistrates	1170
Assistant Clerk-Magistrates	1170
CPOs	1170

#### MEMORANDUM

TO: District Court Judges, Clerk-Magistrates, Assistant Clerk-Magistrates, and Chief Probation Officers

FROM: Hon. Paul C. Dawley, Chief Justice

DATE: January 29, 2016

SUBJECT: Uniform Trial Court Rules for Civil Commitment Proceedings for Alcohol and Substance Abuse under G.L. c. 123, § 35

On February 1, 2016, the Uniform Trial Court Rules for Civil Commitment Proceedings for Alcohol and Substance Abuse become effective. These rules govern the procedures under G.L. c. 123, § 35. To implement these new rules, I am promulgating several new forms and a protocol.

- 1. New Form - Respondent Information.** The Respondent Information form will accompany the Section 35 Petition for Commitment for Alcohol and Substance Abuse. This form allows the Petitioner to provide the court and police with information useful in executing a warrant of apprehension, should such a warrant issue. Many Petitioners may not have all of the information necessary to fill out the form completely. Petitioners should be informed they should provide any information available to them, and that Petitions will not be rejected for filing because a Respondent Information Form is incomplete.

This new form is attached and will be posted on both the Trial Court public internet site and the District Court intranet site.

- 2. New Form - Warrant of Apprehension.** The new Warrant of Apprehension form reflects the change in Rule 3(d) that permits a judge to choose a different return court than the issuing court. It is important to note that, under Rule 3(c), the judge must determine how long the warrant will be effective, but that the warrant of apprehension may be effective no longer than three business days.

This new form is attached and will be posted on the District Court intranet site.

3. **New Form - Order of Commitment.** The new Order of Commitment form implements Rule 8(b) by listing the requirement that the treatment facility notify the court of any escape, transfer, or release.

This new form is attached and will be posted on the District Court intranet site.

4. **New Form - Notice of Escape, Transfer, or Release.** The new Notice of Escape, Transfer, or Release form must be used by treatment facilities in notifying committing courts of a Respondent's escape, transfer, or release from custody pursuant to Rule 8(b). Facilities now will be able to electronically mail this form to a special Section 35 notification electronic mail address that has been set up for each District Court. The Clerk-Magistrates have been requested to designate appropriate points of contact in each District Court to receive these notifications.

When a court receives a notice of escape, that notice should be docketed and then brought to the attention of a judge immediately. The judge must then decide whether to issue a new warrant of apprehension. It is important to note that the warrant of apprehension issued under G.L. c. 123, § 35 does not fall within the Warrant Management System and is active only during court business hours. A Respondent who has escaped and is apprehended should be appointed counsel. In addition, the Respondent should be provided with a hearing to determine whether that person should be returned to the same facility, sent to a different facility, or released. While this hearing is not a new commitment proceeding, the court may order a new clinical evaluation or make new findings of a likelihood of serious harm.

When a court receives a notice of a transfer or release from a facility, that notice should be docketed and placed in the file.

This new form is attached and will be posted on the District Court intranet site.

5. **New Protocol for Intercourt Communications.** Attached is a protocol addressing communications between courts when one court issues a warrant returnable to another court or when a Respondent is unexpectedly brought into a third court, as permitted by Rules 3(d) and 10.

This protocol was created in collaboration with a working group of Clerk-Magistrates, chaired by Clerk-Magistrate Whitney Brown. Thank you to everyone who participated for offering your time and contributing detailed substantive and practical analysis of this new procedure.

In summary, a court issuing a warrant returnable to another court has the obligation to notify both the return court and the police department that will execute the warrant. The issuing court must send both that court and the police department, presumably by

facsimile, a copy of the Petition, Respondent Information form, and the Warrant. The return court will retain these documents until either the Respondent is brought in or the warrant expires. The return court may wish to follow-up with the police department, both to assist the police department and to learn when execution is likely. The return court will not initiate a case in MassCourts until and unless the Respondent is brought in.

If the Respondent is unexpectedly brought to a third court, that court will contact the issuing court to obtain copies of the Warrant, Respondent Information form, and Petition.

The Administrative Office will continue to consult with the working group of Clerk-Magistrates and the Trial Court on using technological resources to streamline this procedure in the coming months.

This protocol is attached and will be posted on the District Court intranet site.

6. **New Cover Sheet - Communications between Courts.** The new cover sheet for Communication between Courts will provide the basic information needed to allow a return court to process the documents provided by the issuing court. The cover sheet also has a bottom section for use by the return court in notifying the issuing court of the result of the commitment proceedings, as required by Rule 10(c). If this form is used, it is not necessary also to transmit the new court's docket entries. An issuing court receiving this cover sheet should docket and file it.

This new cover sheet is attached and will be posted on the District Court intranet site.

7. **An Act Relative to Civil Commitments for Alcohol and Substance Use Disorders.** As described in a legal bulletin on January 26, 2016, the Governor recently signed St. 2016, c. 8, which will make changes to Section 35, effective April 24, 2016. We are working actively with the other Trial Court Departments to implement the provisions of this new legislation. The new legislation requires changes to the Petition form and the Order of Commitment Form, as well as amendments to the Uniform Rules, all of which will be provided before the effective date. We are continuing to work on these changes, and we will communicate further details on the implementation plan.

We welcome any input or questions on the new forms and procedures. Please direct your feedback and inquiries to Joseph M. Ditkoff at [joseph.ditkoff@jud.state.ma.us](mailto:joseph.ditkoff@jud.state.ma.us) or Sarah W. Ellis at [sarah.ellis@jud.state.ma.us](mailto:sarah.ellis@jud.state.ma.us).

<b>RESPONDENT INFORMATION FORM</b> AS PROVIDED BY PETITIONER G.L. c. 123 § 35		DOCKET NO. (for court use only)		<b>Trial Court of Massachusetts</b> <b>District Court Department</b>	
This information is requested to help police identify and locate the Respondent in order to serve the Respondent with any summons or execute any warrant of apprehension pursuant to G.L. c. 123 § 35. Please provide as much information as possible.					
RESPONDENT'S NAME			OTHER NAMES USED BY RESPONDENT, IF ANY		
RESPONDENT'S DATE OF BIRTH		RESPONDENT'S PLACE OF BIRTH		RESPONDENT'S SOCIAL SECURITY NUMBER	
MOTHER'S MAIDEN NAME (FIRST, LAST)			FATHER'S NAME (FIRST, LAST)		
SEX <input type="checkbox"/> MALE <input type="checkbox"/> FEMALE	RACE	EYE COLOR	HAIR COLOR	HEIGHT	WEIGHT
BUILD		OTHER PHYSICAL CHARACTERISTICS (beard, glasses, scars, tattoos, complexion, hairstyle)			
PHOTO AVAILABLE (HELPFUL FOR ID) <input type="checkbox"/> YES <input type="checkbox"/> NO		PLEASE ATTACH			
RESPONDENT'S HOME ADDRESS (NO., STREET, CITY, STATE, ZIP CODE)			APT NO.	FLOOR NO.	NAME ON DOOR/MAILBOX
RESPONDENT'S HOME PHONE NO.	RESPONDENT'S CELL PHONE NO.	DOES THE RESPONDENT UNDERSTAND ENGLISH? <input type="checkbox"/> YES <input type="checkbox"/> NO		IF NOT, WHAT LANGUAGES?	
RESPONDENT'S EMPLOYER/WORKPLACE			TITLE		DEPARTMENT
WORK ADDRESS (NO., STREET, CITY, STATE, ZIP CODE)			WORK TELEPHONE NO.		WORK HOURS
OTHER PLACES RESPONDENT MAY BE FOUND (friends, bars, relatives, hangouts)			BEST PLACE TO FIND RESPONDENT		BEST TIME TO FIND RESPONDENT
MOTOR VEHICLE LICENSE PLATE	YEAR	MAKE	MODEL		COLOR
DOES THE RESPONDENT HAVE: (describe briefly)					
A history of violence toward police officers? <input type="checkbox"/> YES <input type="checkbox"/> NO					
A history of using/abusing drugs or alcohol? If so, what kind? <input type="checkbox"/> YES <input type="checkbox"/> NO					
Access to guns, a license to carry, or possess a gun? If so, what kind? <input type="checkbox"/> YES <input type="checkbox"/> NO					
Psychiatric/emotional problems? If so, what kind? <input type="checkbox"/> YES <input type="checkbox"/> NO					
Any other information which might be helpful in locating the Respondent:					
DATE SIGNED		PETITIONER'S NAME (printed)		PETITIONER'S SIGNATURE	

# **ASSAULT WEAPON BAN**

**July 20, 2016**

## **ENFORCEMENT NOTICE**

### **PROHIBITED ASSAULT WEAPONS**

*The Office of the Attorney General (AGO) is issuing this Enforcement Notice to provide a framework to gun sellers and others for understanding the definition of "Assault weapon" contained in G.L. c. 140, § 121 ("Section 121"). In particular, this notice provides guidance on the identification of weapons that are "copies" or "duplicates" of the enumerated Assault weapons that are banned under Massachusetts law.*

*This guidance will be applied to future transfers of "Assault weapons," as that term is defined in Section 121. This may include, without limitation, the AGO's enforcement of criminal laws such as G.L. c. 140, §§ 128 and 131M, and civil laws such as G.L. c. 93A.*

#### **Background:**

The sale, transfer, or possession of an "Assault weapon," as defined in Section 121, is unlawful pursuant to G.L. c. 140, §§ 128 and 131M.

"Assault weapon" is defined as a:

semiautomatic assault weapon as defined in the federal Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. section 921(a)(30) as appearing in such section on September 13, 1994, and shall include, but not be limited to, any of the weapons, **or copies or duplicates of the weapons** [emphasis added], of any caliber, known as:<sup>1</sup>

- (i) Avtomat Kalashnikov (AK) (all models);
- (ii) Action Arms Israeli Military Industries UZI and Galil;
- (iii) Beretta Ar70 (SC-70);
- (iv) Colt AR-15;
- (v) Fabrique National FN/FAL, FN/LAR and FNC;
- (vi) SWD M-10, M-11, M-11/9 and M-12;
- (vii) Steyr AUG;
- (viii) INTRATEC TEC-9, TEC-DC9 and TEC-22; and
- (ix) revolving cylinder shotguns, such as, or similar to, the Street Sweeper and Striker 12;

provided, however, that the term assault weapon shall not include:

- (i) any of the weapons, or replicas or duplicates of such weapons, specified in appendix A to 18 U.S.C. section 922 as appearing in such appendix on

<sup>1</sup> The enumerated weapons are slightly renumbered here for clarity in light of a redundant numbering scheme in the text of the statute.



September 13, 1994, as such weapons were manufactured on October 1, 1993;

- (ii) any weapon that is operated by manual bolt, pump, lever or slide action;
- (iii) any weapon that has been rendered permanently inoperable or otherwise rendered permanently unable to be designated a semiautomatic assault weapon;
- (iv) any weapon that was manufactured prior to the year 1899;
- (v) any weapon that is an antique or relic, theatrical prop or other weapon that is not capable of firing a projectile and which is not intended for use as a functional weapon and cannot be readily modified through a combination of available parts into an operable assault weapon;
- (vi) any semiautomatic rifle that cannot accept a detachable magazine that holds more than five rounds of ammunition; or
- (vii) any semiautomatic shotgun that cannot hold more than five rounds of ammunition in a fixed or detachable magazine.

Section 121 incorporates by reference the definition of "semiautomatic assault weapon" in the former federal assault weapons ban. This establishes that in Massachusetts weapons with the following characteristics are also within the definition of Assault weapon:<sup>2</sup>

18 U.S.C. section 921(a) (30) as appearing in such section on September 13, 1994:

(B) a semiautomatic rifle that has an ability to accept a detachable magazine and has at least 2 of—

- (i) a folding or telescoping stock;
- (ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;
- (iii) a bayonet mount;
- (iv) a flash suppressor or threaded barrel designed to accommodate a flash suppressor; and
- (v) a grenade launcher;

(C) a semiautomatic pistol that has an ability to accept a detachable magazine and has at least 2 of—

- (i) an ammunition magazine that attaches to the pistol outside of the pistol grip;
- (ii) a threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer;
- (iii) a shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the nontrigger hand without being burned;

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<sup>2</sup> The former federal assault weapons ban also included the enumerated weapons described in the Commonwealth's definition of "Assault weapons" together with "copies or duplicates of such weapons."

- (iv) a manufactured weight of 50 ounces or more when the pistol is unloaded; and
- (v) a semiautomatic version of an automatic firearm; and

(D) a semiautomatic shotgun that has at least 2 of—

- (i) a folding or telescoping stock;
- (ii) a pistol grip that protrudes conspicuously beneath the action of the weapon;
- (iii) a fixed magazine capacity in excess of 5 rounds; and
- (iv) an ability to accept a detachable magazine.

#### **Summary:**

Under the Commonwealth's statutory definition, the following are "Assault weapons":

- 1) Weapons on the list enumerated in G.L. c. 140, § 121, such as the Colt AR-15 ("Enumerated Weapons");
- 2) "Copies" or "Duplicates" of the Enumerated Weapons ("Copies or Duplicates"); and
- 3) Weapons with certain features as identified in former 18 U.S.C. § 921(a)(30) ("Features Test").

The AGO is issuing this enforcement notice to explain: (i) what it will deem to be "Copies or Duplicates" of the Enumerated Weapons in Section 121, and (ii) the distinction between Assault weapons that are "Copies or Duplicates" of Enumerated Weapons and Assault weapons that are defined by the Features Test above.

#### **Guidance:**

A weapon is a Copy or Duplicate and is therefore a prohibited Assault weapon if it meets one or both of the following tests and is 1) a semiautomatic rifle or handgun that was manufactured or subsequently configured with an ability to accept a detachable magazine, or 2) a semiautomatic shotgun.<sup>3</sup>

1. *Similarity Test:* A weapon is a Copy or Duplicate if its internal functional components are substantially similar in construction and configuration to those of an Enumerated Weapon. Under this test, a weapon is a Copy or Duplicate, for example, if the operating system and firing mechanism of the weapon are based on or otherwise substantially similar to one of the Enumerated Weapons.

<sup>3</sup> A weapon is not a Copy or Duplicate under this Guidance if it meets one or more of the exceptions ((i)-(vii)) contained in the statutory definition of Assault weapon in Section 121.

2. *Interchangeability Test:* A weapon is a Copy or Duplicate if it has a receiver that is the same as or interchangeable with the receiver of an Enumerated Weapon. A receiver will be treated as the same as or interchangeable with the receiver on an Enumerated Weapon if it includes or accepts two or more operating components that are the same as or interchangeable with those of an Enumerated Weapon. Such operating components may include, but are not limited to: 1) the trigger assembly; 2) the bolt carrier or bolt carrier group; 3) the charging handle; 4) the extractor or extractor assembly; or 5) the magazine port.

If a weapon meets one of the above tests, it is a Copy or Duplicate (and therefore a prohibited Assault weapon), even if it is marketed as "state compliant" or "Massachusetts compliant."

The fact that a weapon is or has been marketed by the manufacturer on the basis that it is the same as or substantially similar to one or more Enumerated Weapons will be relevant to identifying whether the weapon is a Copy or Duplicate (and therefore a prohibited Assault weapon) under the applicable test(s).

Under Section 121, the Features Test in the former 18 U.S.C. section 921(a)(30) remains an independent basis for qualification as an Assault weapon.

If a weapon, as manufactured or originally assembled, is a Copy or Duplicate under one or both of the applicable tests, it remains a prohibited Assault weapon even if it is altered by the seller. Therefore, a Copy or Duplicate will be treated as an Assault weapon even if it is altered, for example, by pinning the folding or telescoping stock in a fixed position, by removing the pistol grip, by removing a bayonet mount or flash suppressor, or by preventing the weapon from accepting a detachable magazine.

Purely cosmetic similarities to an Enumerated Weapon, such as finish, appearance, or shape of the stock, or appearance or shape of the rail, will not be treated as relevant to a determination of whether a weapon is a Copy or Duplicate.

**Application of this Enforcement Notice (dealers licensed under G.L. c. 140, § 122):**

The Guidance will not be applied to future possession, ownership or transfer of Assault weapons by dealers, provided that the dealer has written evidence that the weapons were transferred to the dealer in the Commonwealth prior to July 20, 2016, and provided further that a transfer made after July 20, 2016, if any, is made to persons or businesses in states where such weapons are legal.

**Application of this Enforcement Notice (individual gun owners):**

The Guidance will not be applied to possession, ownership or transfer of an Assault weapon obtained prior to July 20, 2016.

The AGO reserves the right to alter or amend this guidance.

